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Supreme Court of the United States

OCTOBER TERM, 1995

HARCOURT BRACE JOVANOVICH LEGAL AND PROFESSIONAL PUBLICATIONS, INC. AND COLORADO PROFESSIONAL EDUCATION, INC. D/B/A COLORADO BAR REFRESHER, INC.,

Petitioners,

vs.

MULTISTATE LEGAL STUDIES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, for antitrust tying or predatory pricing purposes, the sale for a single price of a consumer-demanded composite product that includes an admittedly essential component, also sold separately, constitutes the sale of two products.

2. Whether a court may disregard attempted product improvement as a business justification for an alleged tying arrangement by invoking the *per se* rule against tying or by leaving that determination to a jury instead of the marketplace.

3. Whether a firm selling two products as a package can be found liable for predatory pricing where the package price exceeds the sum of the costs of both products.

4. When there has been no prior history of cooperation with business rivals, whether a monopolist has a duty to cooperate in order to avoid adversely affecting the demand for a rival's product or raising its costs.

LIST OF PARTIES AND RULE 29.6 LIST

The caption of this petition identifies all parties in the lower court. Petitioner Colorado Professional Education, Inc. d/b/a Colorado Bar Refresher, Inc. ("CBR") has no parent corporation and no subsidiaries. The parent corporation of Petitioner Harcourt Brace Jovanovich Legal and Professional Publications, Inc. ("HBJ Legal") is Harcourt General, Inc. Petitioner HBJ Legal has no subsidiaries.

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Harcourt Brace Jovanovich Legal and Professional Publications, Inc. ("HBJ Legal") and Colorado Professional Education, Inc. ("CBR") respectfully request that a writ of certiorari be issued to review a decision of the United States Court of Appeals for the Tenth Circuit entered on August 29, 1995. The Tenth Circuit reversed the order of the United States District Court for the District of Colorado granting summary judgment in favor of petitioners.

OPINIONS BELOW

The opinion of the court of appeals is reported at 63 F.3d 1540 (10th Cir. 1995). It is reprinted in the appendix ("App.") at 1a-43a. The district court's oral ruling granting petitioners' motion for summary judgment is reprinted at App. 44a-55a. The court of appeals' order denying petitioners' petition for rehearing is not reported and is reprinted at 56a-57a.

JURISDICTION

The court of appeals entered judgment on August 29, 1995. It denied a timely petition for rehearing on October 2, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2 (1994), and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26. The pertinent portions of these provisions are set forth at App. 58a-59a.

STATEMENT OF THE CASE

Petitioners HBJ Legal and CBR (referred to hereinafter by their trade name "BAR/BRI") offer a six-week "full-service" bar review course in Colorado that is intended to prepare students for all aspects of the bar exam.[1] Since 1972, Colorado has included the Multistate Bar Examination ("MBE") as part of its bar examination and students who achieve an MBE score of 152 or higher automatically pass the Colorado exam.[2] Soon after the MBE was included as part of the Colorado bar exam, BAR/BRI and its full-service competitors added MBE training as an integral part of their full-service bar review courses. (Conviser Aff. ¶¶ 8-11,

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1 HBJ Legal, directly or through licensees such as CBR, offers full-service courses in most states at the end of the fall and spring semesters in preparation for the winter and summer bar examinations.

2 Like most jurisdictions, Colorado's bar examination consists of the MBE, the Multistate Professional Responsibility Examination ("MPRE"), a performance exam and an essay examination on state or general law. The MBE is a 200 question multiple-choice examination covering six basic areas of law -- contracts, constitutional law, criminal law, evidence, property and torts.

19-25)[3] Over the years the level of MBE training in full-service courses has continued to grow and expand, but has always included simulated MBE exams, lectures on test-taking techniques and analysis of practice questions.[4] (Davis Aff. ¶ 11; Conviser Aff. ¶¶ 9, 10)

In 1977, perceiving a deficiency in MBE training within full-service courses, respondent (referred to hereinafter by its trade name "PMBR") began to offer a three-day supplemental MBE workshop consisting of a practice examination and two days of analysis. PMBR scheduled its course just prior to the bar examination and at or near the end of the BAR/BRI or other full-service courses. While full-service courses emphasized that the MBE training they included was all that a student needed to pass the bar exam, PMBR, which originally offered only MBE supplements, largely had the MBE supplement market to itself and soon achieved monopoly market power in that market on a nationwide basis. In 1991, the last year before the conduct in question in this litigation, PMBR's market share exceeded 84 percent of the Colorado supplemental MBE market. (Baseman Aff. Ex. 3)

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[3] Citations to affidavits and transcripts preceded by a person's last name are to affidavits and portions of deposition transcripts submitted by the parties on defendants' motion for summary judgment and made a part of the appendix in the court below.

[4] Full-service courses often refer to the portion of their course in which they administer and review MBE practice questions as a "workshop." (Davis Aff. ¶ 5; Conviser Aff. ¶ 10)

In 1983, BAR/BRI decided to attempt to compete with PMBR by offering, in addition to its full-service course, a three-day supplemental MBE workshop, most recently called "Gilbert," that it promoted to students who did not take the BAR/BRI full-service course or who felt they needed additional MBE training. At the same time, however, BAR/BRI, like other full-service course providers, continued to improve the MBE component of its full-service course. In 1983, BAR/BRI added an MBE technique lecture, and in 1985 it increased the number of practice questions to 650 and added a six-hour MBE workshop. (Davis Aff. ¶¶ 21, 22) Similarly, by 1987, BAR/BRI's full-service competitor in Colorado, Kaplan-SMH ("SMH"), had expanded its full-service course to include a comprehensive volume of MBE practice questions, 18 hours of MBE workshops, two practice exams and a diagnostic analysis. (Davis Aff. ¶ 26 Ex. 5) At all times, BAR/BRI promoted its full-service course as containing sufficient MBE preparation so that its students did not need an MBE supplemental course.

BAR/BRI's decision to market both a full-service course and a supplemental MBE course rendered it vulnerable to a highly effective negative advertising campaign instituted by PMBR in the mid-1980s. Referring to Gilbert, PMBR claimed in its advertisements that BAR/BRI was overcharging its students by making them pay extra for MBE training, in effect admitting that its full-service course did not provide adequate MBE preparation. (Conviser Aff. ¶¶ 32, 37 & Exs. 8, 14) SMH, the other Colorado full-service course, which by this time was including all its MBE training in its full-service curriculum, also began to attack BAR/BRI for charging students "extra" for what it claimed was

included in SMH's full-service course for "free." (Conviser Aff. ¶¶ 33, 35 and Exs. 3, 9-11)

Commencing in 1990, BAR/BRI reacted to these negative advertisements by adding nine hours of in-class MBE testing drills to its full-service course and replacing the existing simulated MBE with an improved computer-graded practice MBE examination. (*See* Davis Aff. ¶¶ 18, 22) The new in-class MBE testing drills, along with the improved MBE examination and the MBE introductory lecture, were then advertised as the "HarBrace" workshops. (Davis Aff. ¶ 22) In the January 1992 course, BAR/BRI made further improvements in its MBE training resulting in the addition of an extra day to the "HarBrace" portion of the BAR/BRI course. BAR/BRI continued, however, to offer Gilbert separately. PMBR's and SMH's advertisements attacking BAR/BRI for selling Gilbert separately also continued.

As each of these improvements was made to the MBE training in BAR/BRI's full-service course, enrollment in Gilbert steadily declined from over 300 students in 1986 to only one enrolled student for the winter 1992 Gilbert course. (Davis Aff. ¶ 27) In the summer of 1992, BAR/BRI combined all its MBE training into its full-service course for which it charged a single tuition. In this process, another day of MBE training was added to the Colorado BAR/BRI full-service course and the teaching materials were revised. (Davis Aff. ¶ 29) Thus, by the summer of 1992, BAR/BRI provided its full-service students with a three-day block of MBE training, which it chose to call Gilbert, and

advertised as "free" to BAR/BRI students.[5] Those students not enrolled in the full-service course could still purchase just the three-day Gilbert portion of the course separately. As a result, BAR/BRI's full-service course, just like SMH's full-service course in Colorado and PMBR's full-service courses in California and Georgia, now included all its MBE training with no additional charge. Today, virtually all full-service courses around the country include MBE workshops without additional charge. (Conviser Aff. ¶¶ 54-56)

PMBR claimed that, beginning in 1991, BAR/BRI created deliberate conflicts between the schedule of its course and PMBR's course. PMBR claimed that it attempted to avoid scheduling its supplemental MBE course on the same days that BAR/BRI classes were taught, even though PMBR sessions are offered during the day until 4:00 p.m. while BAR/BRI classes are taught at night beginning at 6:00 p.m.[6] BAR/BRI never attempted to coordinate course schedules with PMBR.

PMBR sued under Section 1 of the Sherman Act, alleging that BAR/BRI unlawfully tied Gilbert to its full-

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[5] In 1992, tuition for BAR/BRI students in Colorado was $795 for the six-week course, the same as the previous year. In 1993, tuition was raised $50 to account for cost increases in all components of the course. It is undisputed that, in both 1992 and 1993, the full-service tuition more than covered all the costs of the course under any measure. During the same period, PMBR's tuition for its three-day MBE supplemental course was $350.

[6] BAR/BRI also provides its students audiotapes and video replays of lectures missed at no additional charge.

service course and engaged in predatory pricing by offering Gilbert free to BAR/BRI students. In addition, PMBR accused BAR/BRI of violating Section 2 based on the aforementioned conduct and also on the claim that, beginning in 1991, BAR/BRI intentionally created schedule conflicts between its course and the PMBR course. PMBR sought treble damages and a permanent injunction barring BAR/BRI from including Gilbert in its full-service course and requiring BAR/BRI to publish a course schedule far enough in advance so that PMBR could schedule its course however it chose.

After completion of pretrial discovery, BAR/BRI sought summary judgment, conceding solely for purposes of the motion that it had monopoly power in the full-service market in Colorado and that supplemental MBE courses were sold in a separate product market. The parties also stipulated that a full-service course is a single product that includes preparation for all aspects of the bar examination including the MBE examination.[7]

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[7] The full text of the pertinent stipulations is as follows: "[a] full-service bar review course is designed to prepare students for all components of that jurisdiction's bar examination"; "CBR offers a full-service bar review course in the State of Colorado consisting of a six-week curriculum that prepares students for the Colorado bar examination, including the essay portion of the exam, the MBE, the PT and the MPRE." (Pretrial Order ¶¶ IV.C.1., IV.F.2.)

THE PROCEEDINGS BELOW

The District Court's Decision

After considering all evidence and drawing all factual inferences in PMBR's favor, the district judge granted summary judgment in favor of BAR/BRI. (App. 45a-52a) Referring to the parties' pre-trial stipulation that full-service courses include preparation for all components of the bar examination including the MBE, the district court held that the BAR/BRI course was a single product and that BAR/BRI's conduct was simply a legitimate attempt to make improvements in the MBE portion of its course, conduct the antitrust laws are intended to promote. With regard to alleged schedule conflicts, the court found, in light of law students' well-known round-the-clock preparation leading up to the bar examination and the fact that BAR/BRI classes begin two hours after PMBR sessions end, that there were no schedule conflicts of antitrust significance even if the courses were scheduled on the same day.

The Tenth Circuit's Decision

The Tenth Circuit reversed.[8] First, despite the stipulation, the court held that inclusion of Gilbert in BAR/BRI's full-service course resulted in the full-service course becoming two separate products so that any increase

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[8] The court of appeals affirmed the grant of summary judgment on PMBR's Section 2 claims related to alleged false advertising and alleged monopolization of the full-service market. These claims are not the subject of this petition.

in tuition attributable to Gilbert would constitute an unlawful tie-in if a jury concluded that separate consumer demand existed for supplemental MBE courses. The court found that, by raising the 1993 BAR/BRI tuition by $50, BAR/BRI engaged in unlawful tying. The court refused to consider BAR/BRI's business justification defense of attempted product improvement under Section 1 because it applied the *per se* standard to review the tying allegations. The court also determined that the inclusion of Gilbert in 1992 at no additional charge could be predatory pricing even though it is undisputed that the 1992 tuition of $795 easily covered all fully allocated costs for the entire BAR/BRI course including Gilbert. It also denied summary judgment as to the Section 2 claims because it found a jury might conclude that the addition of more MBE training did not actually improve the BAR/BRI course. Finally, the court held that a jury could find BAR/BRI's failure to coordinate its schedule with PMBR was a violation of Section 2 because it could raise PMBR's costs or inconvenience PMBR's students.

REASONS FOR GRANTING THE WRIT

Issues of overriding importance to the antitrust law of tying, product improvements, pricing, and cooperation by firms with monopoly power were erroneously decided below, creating a split among the circuit courts and an intolerable deviation from the Court's earlier decisions. If allowed to stand, the Tenth Circuit's rulings will deter competition and place in doubt competitive practices routinely undertaken by firms selling composite products or services, whenever any of these essential components are also sold separately. At-

tempts by competitors to improve their products and respond to competition will be undercut and new duties to cooperate among rivals will be created in the name of antitrust jurisprudence. Armed with this ruling, threatened treble damages and injunctions, antitrust plaintiffs will enlist the aid of juries, instead of the judgments of consumers in the marketplace, to assess the innovations of their rivals.[9]

I.

THE TENTH CIRCUIT RULING MISCONSTRUED THE *JEFFERSON PARISH* TWO-PRODUCT TEST AND CONFLICTS WITH A MAJORITY OF THE CIRCUITS

In *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984), the Court determined that whether one product or two are involved for purposes of an antitrust tie-in

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[9] Supreme Court review at the summary judgment stage of this litigation is desirable since pre-trial discovery is complete and, if BAR/BRI's view as to the law is correct, a lengthy trial and further appellate review would be a waste of judicial energy and the resources of the parties. "Summary judgment is particularly important in antitrust cases because of the fearful dimensions that such cases can assume and because of the powerful incentives to offer claims or defenses of little merit." 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 322, at 62 (rev. ed. 1995). *See also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 289-90 (1968); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 660 n.4 (7th Cir.), *cert. denied*, 484 U.S. 977 (1987).

analysis depends "not on the functional relation between them, but rather on the character of the demand for the two items." 466 U.S. at 19; *see also Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 462-63 (1992). In announcing this rule, the Court ruled out one extreme view of the two-product inquiry -- that two products can be treated as one for antitrust purposes whenever they are functionally related. However, neither *Jefferson Parish* nor *Kodak* addressed the issue here: Whether a composite product that *necessarily* includes a component also sold separately should be treated as two products.[10] By its extension of *Jefferson Parish* and *Kodak* to composite products, the Tenth Circuit carries the two-product inquiry to the opposite extreme: All products that include one or more elements for which separate demand exists are now to be treated as tie-ins, even when the composite product, by definition, must include the component.

The parties stipulated that full-service bar review courses that include MBE preparation are a single product for which separate demand exists. By treating BAR/BRI's

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10 In both cases, the Court was careful to point out that the alleged tied product was not an *essential* component of the tying product. *Jefferson Parish*, 466 U.S. at 23 n.36 ("only 27 percent of anesthesiologists have financial relationships with hospitals"); *id.* at 23 ("consumers differentiate between anesthesiological services and the other hospital services provided by petitioners"); *id.* at 24 n.39 ("other hospitals often permit anesthesiological services to be purchased separately"); *Kodak*, 504 U.S. at 462 ("Evidence in the record indicates that services and parts have been sold separately in the past and still are sold separately to self-service equipment owners.")

1992 enhancements to the MBE component of its course as a tie-in of two products despite the parties' stipulation, the Tenth Circuit has distorted the two-product requirement of *Jefferson Parish* and *Kodak* into an instrument for the obstruction of pro-competitive behavior and placed itself at odds with a number of other circuits.

Subsequent to *Jefferson Parish,* the Seventh Circuit in *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984), emphasized that "a building is a single product and not a tie-in of the walls, floors, roof, windows, and so forth," 737 F.2d at 704, even if some of these components are also available in separate markets. As Judge Posner explained:

> Almost every product can be viewed as a package of component products: a pair of shoes, for example, as a package consisting of a left shoe and a right shoe; a man's three-piece suit as a package consisting of a jacket, vest, and pants; a belt as a package consisting of a buckle and a strap. . . . Very few products today are produced like a statue that is made by pouring molten bronze into a cast -- the ultimate single product. *But to hold therefore that every composite product is a tie-in, subject to the hostile scrutiny to which antitrust law still subjects tie-ins, would place industry under a vast antitrust cloud, and has been rejected.*

Id. at 703 (emphasis added).

All other circuits that have considered the issue agree. In an unpublished opinion, the Fourth Circuit ruled,

in *Montgomery County Ass'n of Realtors, Inc. v. Realty Photo Master Corp.*, 1993-1 Trade Cas. (CCH) ¶ 70,239 (4th Cir.) (per curiam), *cert. denied*, 114 S. Ct. 440 (1993), that the sale of descriptions of real estate in a multi-list service together with photographs of the real estate constituted a single product, even though formerly photographs were only sold separately.[11] Similarly, the Ninth Circuit upheld the ruling that residences sold with leaseholds of real estate constitute a single product even though there may be "a market for houses apart from the land, just as there may be a market for automobile engines apart from the whole motor car." *Souza v. Estate of Bishop*, 594 F. Supp. 1480, 1487 (D. Haw. 1984), *aff'd*, 821 F.2d 1332 (9th Cir. 1987); *see also Sobrato v. Prudential Ins. Co. of Am.*, 632 F.2d 786, 787 (9th Cir. 1980) (land sold with improvements combined to form a single product).

The Tenth Circuit's ruling is directly contrary to these decisions. As stipulated, full-service bar review courses satisfy consumer demand to take a single course covering all aspects of the bar examination, and thus squarely fit within the Seventh Circuit's definition of "composite products" in *Jack Walters*. MBE preparation is as essential to a full-service course as is the buckle on a belt. The Tenth

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[11] The Tenth Circuit cited *Service & Training, Inc. v. Data General Corp.*, 963 F.2d 680 (4th Cir. 1992), for the proposition that computer support services and a diagnostic software program were not a single product even though functionally related. (*See* App. 14a) However, there, as in *Jefferson Parish* and *Kodak*, ample evidence existed that the purchase of support services was not *essential* to the sale of the diagnostic software program.

Circuit placed itself squarely at odds with the *Jack Walters* line of cases in holding that two products were involved since separate demand existed for MBE supplemental courses. *Compare Jack Walters*, 737 F.2d at 704 ("[w]e doubt that, even after *Jefferson Parish*, belts are tie-ins of buckles to straps" even if there is separate demand for ornamental buckles). The Tenth Circuit either failed to understand or simply brushed aside the dramatic expansion of *Jefferson Parish* and *Kodak* its decision entails by treating a composite product as a tie of two separate products, notwithstanding the stipulation that full-service courses must include MBE preparation. Its only citations supporting this expansion were three decisions that did *not* concern composite products at all; instead, all three cases involved the tying of replacement parts to electric motors or automobiles.[12] Unlike a full-service bar review course, which cannot be sold without MBE training, there is ample demand for automobiles or electric motors separate from replacement parts.

If allowed to stand, the Tenth Circuit's ruling will dramatically expand the reach of the antitrust laws and place in doubt a number of very important competitive practices routinely undertaken by firms, both large and small. There

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[12] (*See* App. 14a-15a (citing *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 826 F.2d 712, 720 (7th Cir. 1987) (electric motors and replacement parts); *Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 593 F. Supp. 1506, 1515 (N.D. Cal. 1984) (Mercedes-Benz automobiles and replacement parts); *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 1982-2 Trade Cas. (CCH) ¶ 64,861 (D. Md. 1982) (same), *rev'd in part*, 1984-1 Trade Cas. (CCH) ¶ 65,766 (D. Md. 1983), *vacated and earlier order reinstated*, 1984-2 Trade Cas. (CCH) ¶ 66,226 (D. Md. 1984)))

are countless products in today's society that consist of components for which there is separate consumer demand. Consider, for example, automobiles with tires, radios or air conditioners; houses with land, windows or doors; cold pills consisting of decongestants plus pain relievers; cookies made with butter; shoes with laces; or belts with buckles, to name just a few.

The decision at bar creates a serious conflict among the circuits as to an issue left open by this Court in *Jefferson Parish* and *Kodak*. This Court's attention is required to resolve this conflict and to undo the threat to competition posed by the Tenth Circuit's flawed analysis.[13]

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[13] The Tenth Circuit also erred in finding that economic coercion might occur in this case since purchasers of BAR/BRI's full-service course received additional MBE training without additional charge. (*See* App. 17a-18a) Whether BAR/BRI's tuition remained at $795 (as it did in 1992) or was increased by $50 (as it was in 1993), there is no dispute that BAR/BRI's tuition is the same whether or not the student attends the Gilbert portion of the course or purchases additional MBE training elsewhere. Courts and commentators agree that for there to be a finding of economic coercion the cost of the tying product alone must exceed the cost of the tying and the tied products sold as a package. *See, e.g., In re Data Gen. Corp. Antitrust Litig.*, 490 F. Supp. 1089, 1111 (N.D. Cal. 1980) (more expensive to purchase CPU without memory than to buy CPU bundled with memory); Herbert Hovenkamp, *Economics and Federal Antitrust Law* § 8.10, at 238 (1985) (economic coercion exists where product A is $10 purchased alone but $6 when purchased with product B).

II.

THE TENTH CIRCUIT'S REJECTION OF BAR/BRI'S PRODUCT IMPROVEMENT DEFENSE GENERATES CONFUSION IN THE COURTS AND ANTI-COMPETITIVE CONSEQUENCES IN THE MARKETPLACE

Even if viewed as the tying of two separate products, the incorporation into BAR/BRI's full-service course of MBE materials developed for use in the supplemental market was nothing more than an obvious attempt to improve BAR/BRI's course in response to competition. However, the Tenth Circuit refused to consider the legitimate business justification of product improvement as a defense under the *per se* Section 1 tying standard. It then proceeded to reverse the summary judgment granted under Section 2 by holding that a jury might conclude that the BAR/BRI course was not, in fact, improved. Both determinations require the Court's review.

A. APPLICATION OF THE *PER SE* STANDARD IN TIE-IN CASES TO FORECLOSE ANY BUSINESS JUSTIFICATION DEFENSE INTENSIFIES CIRCUIT CONFLICTS AND PREVENTS FIRMS FROM ENGAGING IN PRO-COMPETITIVE BEHAVIOR

The Tenth Circuit's decision demonstrates the need for the Court to reconsider the *per se* standard in tying actions. Even if a *per se* standard is retained, a conflict exists among the circuits as to whether the standard permits

business justifications to be considered under Section 1 of the Sherman Act.[14]

In *Jefferson Parish*, a bare 5-4 majority concluded that:

> It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable "*per se*."

466 U.S. at 9.

Few antitrust rulings of this Court have generated more critical commentary and decisional confusion in the lower courts.[15] In light of this trenchant criticism and the

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[14] Reconsideration of the *per se* rule against tying is appropriate in this case because, under the Tenth Circuit's holding, a jury could find that BAR/BRI's inclusion of Gilbert in the Summer of 1992 enhanced consumer welfare but still be forced to conclude that the inclusion of Gilbert was *per se* unlawful under Section 1. As the Tenth Circuit saw it, the jury should be permitted to consider BAR/BRI's proffered business justifications and the net effect on competition in the tied product market only under Section 2, and yet be foreclosed from applying the same rule of reason analysis in a Section 1 inquiry.

[15] *See, e.g.*, 9 Phillip E. Areeda, *Antitrust Law* ¶ 1720a, at 258 (1991) ("the *per se* rule against tying provides little guidance and simplifies little"); *id.* ¶ 1730, at 406 (*per se* tying rule "is ripe for reform because the prerequisites for *per se* illegality are absent and because this peculiar *per se* rule does not benefit society with simplified litigation or private planning"); Kurt A. Strasser, *An* (continued...)

confusion the rule has generated, the *per se* rule ought to be reconsidered. *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 47-58 (1977) (jettisoning *per se* rule in vertical territorial restriction cases since the rule was "the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts"). Thus, it is now appropriate for the Court to adopt Justice O'Connor's carefully reasoned view, set forth in her concurring opinion in *Jefferson Parish*, that:

> The time has therefore come to abandon the "*per se*" label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have. . . . This change

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[15](...continued)

Antitrust Policy for Tying Arrangements, 34 Emory L.J. 253, 288 (1985) (*per se* rule articulated in *Jefferson Parish* "is too rigid and simplistic" because "it does not consider motives other than an intent to monopolize the tied market, and it overlooks potential justifications for the tie"); *see also* Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 380-81 (1978); Richard A. Posner, *Antitrust Law: An Economic Perspective* 171-83 (1976); William F. Baxter, *The Viability of Vertical Restraints Doctrine*, 75 Cal. L. Rev. 933, 939-40 (1987); Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L.J. 135, 143-46 (1984); Ward S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, 67 Yale L.J. 19, 20, 29-34 (1957); Lawrence T. Festa, III, Comment, *Eastman Kodak Co. v. Image Technical Services, Inc.: The Decline and Fall of the Chicago Empire?*, 68 Notre Dame L. Rev. 619, 644, 671 (1993) .

> will rationalize rather than abandon tie-in doctrine as it is already applied.

466 U.S. at 35 (O'Connor, J., concurring).

Despite the *per se* appellation, other than the Tenth Circuit, the circuits that have considered the issue have concluded that they can examine legitimate business justifications for a tie proffered by a defendant. The Fourth, Sixth and Ninth Circuits have all held that antitrust defendants may demonstrate a business justification for an otherwise *per se* illegal tying arrangement. *See Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft,* 828 F.2d 1033, 1042 n.17 (4th Cir. 1987) ("Business justification, of course, is an affirmative defense to claims of *per se* illegality."), *cert. denied*, 486 U.S. 1017 (1988); *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 957 F.2d 1318, 1323 (6th Cir.) ("Even if a per se violation is established, a defendant may prevail by showing a substantial business justification for the tie-in."), *vacated on other grounds,* 113 S. Ct. 314 (1992); *Mozart Co. v. Mercedes-Benz of N. Amer., Inc.*, 833 F.2d 1342, 1348-49 (9th Cir. 1987) (citing four other Ninth Circuit decisions on point), *cert. denied*, 488 U.S. 870 (1988).

In *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792 (1st Cir. 1988) (Breyer, J.), the First Circuit suggested in dictum that, given sufficient evidence of legitimate, procompetitive business justifications and that the tie was "'efficient' enough a way to do business," a tying agreement could "escape[ ] . . . *per se* condemnation under the lines of cases that have created certain exceptions to the *per se* rule where economic, or procompetitive justifications

are particularly strong." *Id.* at 799; *see also Kenworth of Boston, Inc. v. Paccar Fin. Corp.*, 735 F.2d 622, 624 (1st Cir. 1984) (Breyer, J.) (expressing concern that tie-ins not be treated like "a procrustean bed").

The underlying rationale against tying -- that a monopolist in market A will be able to use its power in market A to gain an unfair advantage in market B -- is also at odds with the Court's most recently pronounced views on monopolization law. In *Spectrum Sports, Inc. v. McQuillan*, 113 S. Ct. 884 (1993), the Court confirmed that conduct by a single firm is actionable under Section 2 only when it threatens to result in actual monopolization of another market. *Id.* at 892.[16] This coincides with Justice O'Connor's position, in her concurrence in *Jefferson Parish*, that tying arrangements should be unlawful only where there is a dangerous probability that the defendant could obtain market power in the market for the tied product. *See* 466 U.S. at 38-39 (O'Connor, J., concurring). This approach is also consistent with accepted antitrust analysis of monopoly leveraging.[17]

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[16] In fact, as the record makes clear, PMBR and not BAR/BRI dominates the sale of MBE supplements. (Baseman Aff. Ex. 3)

[17] In related contexts, circuit courts have rejected the "leveraging" theory on the sound basis that even a monopolist can extract a monopoly profit only once. *See, e.g.*, *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 206 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1285 (1993); *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 546-49 (9th Cir. 1991), *cert. denied*, 503 U.S. 977 (1992); *see also* Bork, *The Antitrust Paradox* 365-

(continued...)

Not only are tying arrangements not inherently anti-competitive, the application of the *per se* rule does not result in any judicial economies. Under *Jefferson Parish*, a court must examine the character of demand for the tying and tied product to determine whether there are two products involved and then closely examine the structure of the tying product market including the defendant's market share, the existence of barriers to entry and the number of other competitors, in order to determine whether the requisite economic power over the tying product is present. Next, the court must analyze whether or not "forcing" has occurred. Moreover, as *Jefferson Parish* and *Kodak* make clear, a court must also perform a sophisticated analysis of market imperfections in the tying product market including information asymmetries, the inexperience or sophistication of purchasers, and switching costs.

Ironically, the only analysis a court is precluded from performing under the *per se* rule is whether the challenged conduct actually harms or enhances competition -- which is, after all, the purpose of the Sherman Act and the ultimate inquiry.

All this undoubtedly led Justice O'Connor to conclude in her concurrence in *Jefferson Parish* that:

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[17](...continued)
81; Posner, *Antitrust Law: An Economic Perspective* 171-83; Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L.J. at 143-45.

> [the] tying doctrine incurs the costs of a rule-of-reason approach without achieving its benefits: the doctrine calls for the extensive and time-consuming economic analysis characteristic of the rule of reason, but then may be interpreted to prohibit arrangements that economic analysis would show to be beneficial.

466 U.S. at 34 (O'Connor, J., concurring).

This case involves a straightforward practice, obviously pro-competitive on its face. BAR/BRI was simply responding to PMBR's and others' competition and years of intense critical advertisements focused on BAR/BRI's refusal to include Gilbert's training in its full-service course. It is undisputed that the summer 1992 BAR/BRI course gave students more training for the same cost. Under the lower court's ruling, BAR/BRI could be required to de-integrate the full-service course demanded by students into a separate supplemental MBE workshop that has been resoundingly rejected by the market and a full-service course that is inferior by definition because it cannot include the best MBE training BAR/BRI is capable of providing. Application of the *per se* rule in this case would serve only to protect PMBR and others similarly situated from the kind of aggressive competition the Sherman Act is all about:

> The purpose of the Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.

> It does so not out of solicitude for private concerns but out of concern for the public interest.

Spectrum Sports, 113 S. Ct. at 891-92.

The Court should act to protect the workings of the marketplace by abandoning the *per se* rule or clarifying it to permit consideration of the product improvement business justification defense.

B. THE TENTH CIRCUIT'S RULING DEPARTS FROM PREVAILING LAW IN ASSIGNING TO JUDGES AND JURIES RATHER THAN THE MARKETPLACE DETERMINATIONS AS TO THE MERITS OF ATTEMPTED PRODUCT IMPROVEMENTS

The antitrust laws should encourage all competitors in a market, including monopolists, to respond to competition by attempting to improve their products. *Telex Corp. v. IBM*, 510 F.2d 894, 927 (10th Cir.) (Sherman Act cannot be invoked against a monopolist to "prohibit the adoption of legal and ordinary marketing methods already used by others in the market"), *cert. dismissed*, 423 U.S. 802 (1975). Particularly where there can be no claim that compatibility with a monopolist's system is essential to gaining market access, any rule that would allow juries to assess treble damages if they found that attempts to improve products were unsuccessful would deter the very conduct that the antitrust laws encourage. *See Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 375, 378 (7th Cir. 1986) ("monopolist should be free to compete like everyone

else"; "*the free market and not a judge or a jury decides whose products are inferior*") (emphasis added), *cert. denied*, 480 U.S. 934 (1987). *See also California Computer Prods. v. IBM*, 613 F.2d 727, 744 (9th Cir. 1979) (monopolist has "the right to redesign its products to make them more attractive to buyers"). Professors Areeda and Hovenkamp advocate a rule of presumptive lawfulness for product redesigns. They state:

> At the very least, as all courts recognize, product improvement is protected and beyond antitrust challenge. . . . That buyers prefer the redesigned product over the previous and still available product is often conclusive evidence of an improvement.

Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 738.1, at 677 (Supp. 1995).

The Tenth Circuit decision effectively nullifies product improvement as a viable defense for entities with market power, placing them at risk of treble damages based on the unpredictable reaction of a jury whose members may never have had a need for the product. In so doing, the court's ruling forestalls competition in the bar review industry and gives short shrift to the important policy concern voiced by circuit courts and commentators that judges and juries should not be asked to determine the validity of a product modification -- a question best left for determination by marketplace competition.

It is difficult to imagine a greater perversion of the antitrust laws than to invoke them, as PMBR seeks to do, to thwart any effort by BAR/BRI to address perceived product

deficiencies, particularly when these deficiencies were the subject of PMBR's attack advertisements against BAR/BRI and when PMBR in other markets and BAR/BRI's other full-service competitors in Colorado and elsewhere have freely adopted the very same innovation.

III.

THE TENTH CIRCUIT IGNORED THE COURT'S PRONOUNCEMENTS ON THE LAW OF PREDATORY PRICING IN FINDING THAT A PRICE FOR A MULTI-COMPONENT PRODUCT COULD BE PREDATORY EVEN THOUGH SOLD ABOVE THE SUM OF THE COSTS OF ITS INDIVIDUAL COMPONENTS

The lower court's decision that predatory pricing may have occurred when BAR/BRI incorporated the Gilbert program into its full-service course without an increase in tuition conflicts with the Court's decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993), that "a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs."[18] *Id.* at 2587.

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[18] *See also* Hovenkamp, *Economics and Federal Antitrust Law* ¶ 8.7, at 228-29 ("Dominant firms [can engage in predatory pricing] by maintaining the price but providing an additional product or service at no additional charge . . . [But in such cases] [c]ompetitors are injured by the package only if the net price is predatory . . . .").

It is undisputed that the $795 tuition charged by BAR/BRI in the summer of 1992 more than fully covered all the costs of its course, including the Gilbert segment, and yielded a profit. To reach the conclusion that BAR/BRI may have engaged in predatory pricing, the Tenth Circuit arbitrarily refused to assign any of BAR/BRI's 1992 revenue to the three days of its course devoted to the Gilbert program, apparently because BAR/BRI's advertisements touted "Gilbert for free." (App. 20a)

The Supreme Court has recognized the consensus among economists "that predatory pricing schemes are rarely tried, and even more rarely successful." *Matsushita*, 475 U.S. at 589. Thus, courts should be extremely cautious in evaluating claims of predatory pricing lest the court "chill the very conduct the antitrust laws are designed to protect." *Id.* at 594. This is especially true in this case where PMBR is arguing that a competitor has violated the antitrust laws by improving a product without a price increase. This reasoning could apply as well to any other product improvement not accompanied by a price increase, or any claim that a product includes "free" extras. *See Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, J.) ("[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior ends up by discouraging legitimate

price competition.").[19] This dramatic extension of the doctrine of predatory pricing requires review by the Court.

IV.

THE LOWER COURT'S CONCLUSION THAT BAR/BRI HAD A DUTY TO COOPERATE WITH A COMPETITOR IS CONTRARY TO THE TEACHINGS OF THE COURT

Finally, the Tenth Circuit reinstated PMBR's Section 2 claim based upon alleged schedule conflicts between BAR/BRI and PMBR. In so doing, the Tenth Circuit's imposition of potential liability against BAR/BRI for refusal to cooperate with a rival violates the teachings of *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

In *Aspen Skiing,* the Court made it clear that businesses ordinarily do not have a duty to cooperate with their rivals, but permitted liability in that case because the defendants had terminated an existing pattern of cooperation with intent to monopolize:

> In the actual case that we must decide, the monopolist did not merely reject a novel offer to participate in a cooperative venture that had been

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[19] The Tenth Circuit's analysis in this case also creates a classic Catch 22: if BAR/BRI does not increase tuition for the improved full-service course it is guilty of predatory pricing, but if it does increase tuition it is guilty of an unlawful tie-in.

> proposed by a competitor. Rather, the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years.

472 U.S. at 603. In this case, in contrast, there is no history of cooperation between the parties to coordinate their schedules. BAR/BRI had no duty to schedule its own course in order to avoid scheduling conflicts with PMBR or predisclose its schedule so that PMBR would have more advance notice than BAR/BRI's own students. Its failure to do so cannot be treated as an unlawful attempt to monopolize.[20]

The Tenth Circuit attempts to justify potential liability for schedule conflicts by observing that conflicts might tend to disproportionately raise PMBR's costs or to inconvenience prospective students. (App. 31a n.12) It fails to explain when a refusal to cooperate would *not* have the effect of adversely affecting consumer demand for a rival's product or raising its costs. This failure is hardly surprising, since *any* refusal to cooperate by a monopolist could be characterized as a means of adversely affecting consumer demand for a rival's product or raising its costs. This is not only inconsistent with the narrow exception permitted by *Aspen Skiing*, but also removes any practical limitations upon the potential liability faced by monopolists for refusal to

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[20] Indeed, the injunction sought by PMBR in this case would require BAR/BRI to publish its course schedule, and then not change it other than for "unavoidable and unforseen reasons," far enough in advance for PMBR to set its own schedule. (Pretrial Order ¶ III.A. at 4)

cooperate with business rivals. If this conflict with *Aspen Skiing* is not addressed by the Court, the Tenth Circuit's ruling will open a Pandora's Box of new refusal to cooperate theories.[21]

The mischief inherent in the Tenth Circuit's position is perhaps best understood from the relief requested by PMBR, requiring BAR/BRI to pre-disclose its forthcoming course schedule to PMBR and lock itself into that schedule so that PMBR could decide how best to schedule its course to gain the maximum competitive advantage. Once published, BAR/BRI would need its competitor's permission to make changes in its schedule to deal with even the normal problems associated with coordinating faculty members' individual schedules. This is inconsistent with the rulings of the Court and the intent of the antitrust laws.

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[21] The court below also overlooked the fact that in 1992, and thereafter, BAR/BRI added two days of additional MBE training to its full-service course, (Davis Aff. ¶ ¶ 23, 29), which made it inevitable that the number of days on which both the BAR/BRI and PMBR courses would be held would increase.

CONCLUSION

For the reasons set forth a writ of certiorari should issue.

Respectfully submitted,

s/ Stephen M. Axinn

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MULTISTATE LEGAL STUDIES, INC., a Delaware corporation,	)	
Plaintiff-Counter-Defendant-Appellant,	)	
	)	No. 94-1148
v.	)	
HARCOURT BRACE JOVANOVICH LEGAL AND PROFESSIONAL PUBLICATIONS, INC.; COLORADO PROFESSIONAL EDUCATION, INC., doing business as Colorado Bar Refresher, Inc.,	)	
Defendants-Counter-Claimants-Appellees.	)	

FILED
United States Court of Appeals
Tenth Circuit
AUG 29 1995
PATRICK FISHER
Clerk

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. NO. 92-Z-2330)

James M. Harris of Sidley & Austin, Los Angeles, California (Robert Fabrikant of Sidley & Austin, Los Angeles, California; Julia E. Sullivan of Sidley & Austin, Washington, D.C.; and Richard A. Feinstein of McKenna & Cuneo, Washington, D.C., with him on the briefs), for Appellant.

Tucker K. Trautman of Ireland, Stapleton, Pryor & Pascoe, Denver, Colorado (Hardin Holmes of Ireland, Stapleton, Pryor & Pascoe, Denver, Colorado; Stephen M. Axinn and John D. Harkrider of Skadden, Arps, Slate, Meagher & Flom, New York, New York; and Edward P. Timmins of Otten, Johnson, Robinson, Neff & Ragonetti, Denver, Colorado, with him on the briefs), for Appellees.

Before ANDERSON and McWILLIAMS, Circuit Judges, and BROWN,* District Judge.

ANDERSON, Circuit Judge.

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* The Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

I. INTRODUCTION

The plaintiff in this antitrust action is Multistate Legal Studies, Inc. ("PMBR"), a commercial provider of bar examination preparation to would-be lawyers in Colorado and elsewhere. PMBR claims that anticompetitive actions by two other providers of bar review courses, defendants Harcourt Brace Jovanovich Legal and Professional Publications, Inc. ("HBJL") and its Colorado licensee, Colorado Professional Education, Inc. d/b/a/ Colorado Bar Refresher, Inc. ("CBR"), were the reason PMBR's Colorado market share dropped from 84 percent in 1991 to 23 percent in 1993.

PMBR accuses HBJL and CBR of the following antitrust law violations: engaging in an illegal tying arrangement and conspiring to fix predatory prices, in violation of section 1 of the Sherman Act; attempting and conspiring to monopolize the supplemental bar workshop market and monopolizing and conspiring to monopolize the full-service bar review course market, in violation of section 2 of the Sherman Act. PMBR appeals the district court's grant of summary judgment against it on all claims.[1]

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[1] The complaint also contained a tying claim under section 3 of the Clayton Act, which was dismissed as well; because PMBR does not pursue it in its opening brief, we deem it waived. *State Farm Fire & Casualty Co. v. Mhoon*, 31 F.3d 979, 984 n.7 (10th Cir. 1994) (citing *Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1277-78 (10th Cir. 1994)).

We hold that PMBR has shown a genuine issue of material fact with respect to the Sherman Act section 1 tying and predatory pricing claims, and the Sherman Act section 2 claims of attempt and conspiracy to monopolize the supplemental course market, but not with respect to the claims of monopolization of and conspiracy to monopolize the full-service course market.

PMBR also appeals the district court's order overruling PMBR's objections to a magistrate judge's order concerning confidential record information. Because we are remanding the case for trial of other issues, the court's order on this issue becomes interlocutory, and we decline to review it at this time.

II. BACKGROUND

A. BAR EXAM PREPARATION

The Colorado bar exam consists of four components: the Multistate Bar Exam ("MBE"), the Multistate Professional Responsibility Exam ("MPRE"), essay questions, and a law practice simulation problem known as a "performance test."

Two types of bar review courses are relevant to this litigation: "full-service" courses, designed to prepare students for all components of a jurisdiction's bar examination, and "supplemental multistate workshops," which prepare students for only the MBE portion of a jurisdiction's bar exam.

At the heart of this case is the 1992 decision by HBJL and CBR, who previously had offered their full-service course and their supplemental MBE course separately, to offer the full-service course only in a package with the supplemental workshop. HBJL is the country's largest provider of full-service bar review courses. Its exclusive Colorado licensee, CBR, is entitled to use HBJL's "BAR/BRI" course trade name, course materials and national lecturers. HBJL and CBR have stipulated for summary judgment purposes that they exercise monopoly power over the Colorado full-service course market; PMBR's evidence puts their market share at more than 80 percent. *See* Plaintiff-Appellant's App. at 191 (Summ. of Attach. to Pl.'s Mem. in Opp'n to Defs.' Mot. Summ. J. [hereinafter "Summary"]). Their only full-service competitor in Colorado is a company called SMH Bar Review.

The evidence indicates both sides have viewed PMBR as a potential competitor in the Colorado full-service course market. It invested three years and $1 million in an effort to enter the California full-service market, but ultimately abandoned that effort. In conjunction with a company called BRG, PMBR offers a full-service course in Georgia, Alabama, and Tennessee, and has expressed its plans to expand throughout the Southeast. PMBR claims that its plan to expand its full-service course from California to other states, including Colorado, has been stymied by the losses caused by the Defendants' alleged predatory acts. *Id.* at 360-61 (Feinberg Aff. ¶ 30).

PMBR is the largest provider of supplemental MBE workshops nationally, and in Colorado it currently offers only supplemental MBE workshops. PMBR controlled 84 percent of the Colorado supplemental MBE market in 1991 but claims to have dropped to 23 percent by 1993. As discussed infra, HBJL and CBR contest these figures, but we accept them as true for summary judgment purposes. *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 456 (1992).

In addition to the full-service BAR/BRI course, HBJL and CBR also offer a supplemental MBE workshop that competes with PMBR's workshop. The Defendants' course was previously called the HBJ Multistate Workshop; now it is called "Gilbert." In 1991, the Defendants had 11 percent of the Colorado workshop market, but by 1993 their share had risen to 76 percent. Other actual or potential competitors in that market include a company called APTS, with 1 percent of the market in 1993; Reed Law Group, which planned a 1993 workshop but cancelled it; and SMH Bar Review, which historically has bundled its MBE training into its full-service course but also offered a separate workshop in 1991.

B. ANTICOMPETITIVE ACTS

PMBR claims that HBJL and CBR engaged in various anticompetitive acts directly targeted at PMBR in the supplemental MBE market. PMBR also claims that HBJL and CBR illegally acquired their monopoly power in the full-service market through a secret market allocation agreement,

and their monopoly power made it possible for their acts in the MBE workshop market to harm PMBR.

1. Acts Allegedly Directed at PMBR

PMBR claims that starting in 1992, HBJL and CBR began bundling together their supplemental MBE workshop, Gilbert, with their full-service BAR/BRI course and pricing the bundled Gilbert workshop below cost. PMBR also presents evidence of a substantial increase nationwide in the number of scheduling conflicts between the BAR/BRI course and the PMBR workshop starting in 1991. PMBR identifies three specific conflicts in Colorado, in the summer 1991, winter 1991, and summer 1992 courses. And PMBR complains that HBJL and CBR advertised falsely that the BAR/BRI course would include the Gilbert workshop "for free" when actually, in 1993, Defendants raised the BAR/BRI course price by $50.

PMBR contends that these acts had a twofold purpose: to achieve a monopoly in the supplemental MBE workshop market, and thereby to so weaken PMBR that it would be forced to abandon its efforts as a full-service competitor. PMBR alleges that the Defendants adopted this strategy after a prior attempt to avoid competition had failed. PMBR's president, Robert Feinberg, stated that in 1989, HBJL's chief executive officer, Richard Conviser, proposed an illegal market allocation agreement whereby HBJL would abandon the supplemental MBE workshop market nationwide if PMBR would refrain from pursuing future entry into the full-service market outside California. *See* Plaintiff-Appellant's

App. at 193-94 (Summary); *id.* at 359 (Feinberg Aff. ¶ 23). Mr. Feinberg said that when he refused, Mr. Conviser threatened to make him "sorry," and the bundling, predatory pricing, increase in scheduling conflicts, and false advertising then ensued.

2. Defendants' Acquisition of Monopoly Power

PMBR also argues that when HBJL and CBR, or their predecessors, signed their first licensing agreement, they secretly entered into an illegal agreement dividing up the Colorado, Wyoming, and other markets between them, and they have secretly renewed their noncompetition pact ever since. The companies were competitors in the Colorado full-service market before signing their first license agreement in 1974. Since then, although their original written agreement and subsequent written extensions have not prohibited competition, the two companies have not competed against each other. HBJL and CBR deny any secret agreement and say it simply would make no sense to compete and undermine the BAR/BRI trademark. The companies' latest written agreement, signed in 1989, was to expire in 1991 but remains in effect by oral extension.

To support its allegation that a secret agreement existed, PMBR offers evidence that HBJL officials previously proposed market allocation agreements to two other competitors, *id.* at 195-96 (Summary), as well as to PMBR itself, and that in one state HBJL entered an explicit market allocation agreement that was declared illegal per se by the Supreme Court. *See Palmer v. BRG of Georgia, Inc.*, 498

U.S. 46, 49-50 (1990) (per curiam). PMBR also points to evidence that CBR's founder, Jerry Kopel, once threatened to offer competing bar review courses outside Colorado if HBJL did not give him more favorable license terms, but he ultimately did not carry out his threat.

III. DISCUSSION

We review the grant of summary judgment de novo, applying the same legal standard used by the district court under Fed. R. Civ. P. 56(c). *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). Because PMBR is the nonmoving party, its evidence is to be believed; all justifiable inferences are to be drawn in its favor; its nonconclusory version of any disputed issue of fact is assumed to be correct. *See Kodak*, 504 U.S. at 456.

A. ANTITRUST CLAIMS

PMBR claims violations of both section 1 and section 2 of the Sherman Act. Section 1 of the Act focuses on the anticompetitive behavior of joint actors, prohibiting "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. Section 2 applies to unilateral as well as joint action, making it illegal for a person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of . . . trade or commerce." 15 U.S.C. § 2.

1. Section 1 Tying Arrangement Claim

PMBR claims that HBJL and CBR created an unlawful tying arrangement in violation of Sherman Act section 1, by bundling the Gilbert workshop together with the BAR/BRI course and requiring customers to purchase Gilbert if they wanted BAR/BRI. The Defendants reply that all they did was to improve the curriculum of their full-service BAR/BRI course, a procompetitive act.

Since Colorado began requiring the MBE as part of its bar exam, the Defendants' full-service BAR/BRI course has included some level of MBE preparation. Since the 1970s, BAR/BRI's MBE component has included an in-class practice MBE exam with written answers that could be reviewed at home. In 1989, the label "HarBrace" was attached to this test and associated lectures and practice drills. The separately sold MBE workshop, now known as Gilbert, has consisted of another exam with written answers, plus two days of in-class answer review.

Starting in the 1980s, PMBR and the Defendants' full-service competitor, SMH, began pointing to the Defendants' dual course offerings in their advertising and saying that by selling a separate MBE workshop, the Defendants were admitting that BAR/BRI's internal MBE component was inadequate. At the same time that the ads denigrating the full-service course were appearing, enrollment in Gilbert (or the Defendants' supplemental MBE workshop under a previous name) was dropping precipitously, from 78 people

in the winter 1986 course and 238 in the summer 1986 course to a single student in the winter of 1992.

The Defendants added one day of in-class review of the practice MBE exam to their BAR/BRI course in their winter 1992 session, then added a second day of review in the summer 1992 course, so that the full-service course contained the same three-day workshop format as the separate Gilbert course. They then advertised that students signing up for BAR/BRI would receive Gilbert "for free" or "at no extra charge."[2] The first time they offered the package, in summer 1992, they did not raise the $795 BAR/BRI course tuition. The next winter, however, they raised it by $50, partly to cover some of the Gilbert costs. Customers could still buy Gilbert separately for $325, but they could not get any discount from the package price if they wanted BAR/BRI without Gilbert. This change was made in Colorado and in some, but not all, other states where HBJL operated.

PMBR offers evidence that the bundling of Gilbert was intended as a temporary move only. In a September 11, 1992, letter written by CBR's president, Stephen P. Davis, to an HBJL official, Mike Connors, Mr. Davis referred to a future time when the Gilbert course would again be offered only for added tuition, as it was before the summer of 1992.

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[2] The practice exam within the BAR/BRI course and the practice exam in the separate Gilbert workshop had previously covered the same ground but with different exam questions.

Plaintiff-Appellant's App. at 199 (Summary); *id.* at 346 (Baseman Aff. Ex. 6). PMBR also offers evidence that the administration of the BAR/BRI course and the administration of the Gilbert course have never been combined; the courses have separate national administrators, campus representatives, registration forms and addresses, suggesting that administrative streamlining was not the reason for the bundling.

A tying arrangement is an agreement by a party to sell one product--the "tying product"--only on condition that the buyer also purchase a second product--the "tied product"--or at least agree not to buy that product from another supplier. *Kodak*, 504 U.S. at 461-62 (citing *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958)). A tie-in constitutes a per se section 1 violation if the seller has appreciable economic power in the tying product market and if the arrangement affects a substantial volume of commerce in the tied product market. *Id.* at 462.

The elements, then, of a per se violation, are (1) two separate products, (2) a tie--or conditioning of the sale of one product on the purchase of another, (3) sufficient economic power in the tying product market, and (4) a substantial volume of commerce affected in the tied product market. Here, the parties stipulate to the third requirement, that HBJL and CBR have monopoly power in the full-service course market, and the Defendants have not raised the issue of the fourth requirement, the volume of commerce affected. We examine, therefore, only the two-product and conditioning requirements.

a. The Two-Product Requirement

HBJL and CBR have stipulated that full-service courses and supplemental MBE workshops are in separate product markets for antitrust law purposes. They do not concede, however, that the existence of separate markets means separate products were involved here. They argue that their actions involved nothing more than the improvement of a single product--their full-service course.

PMBR argues on appeal that the district court failed to apply the proper test to determine whether two products exist. We agree. The court focused on PMBR's stipulation that the purpose of a full-service course includes preparing bar applicants for the MBE as well as for the other parts of the bar exam. From this, the court appears to have concluded that any effort to improve the full-service course by adding elements to it could not possibly constitute the bundling of a second product, at least where those added elements related to the MBE. In this the court erred.[3]

The Supreme Court has made clear that the test for determining whether two components are separate products turns not on their function, but on the nature of any consum-

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[3] The district court also erred by relying, for its analysis of this section 1 issue, on *Telex Corp. v. IBM Corp.*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975), a section 2 monopolization case.

er demand for them.[4] For two items at issue to be considered distinct products, "there must be sufficient consumer demand so that it is efficient for a firm to provide [one] separate from [the other]." *Kodak*, 504 U.S. 462; *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 21-22 (1984). *See also Service & Training, Inc. v. Data Gen. Corp.*, 963 F.2d 680, 684-85 (4th Cir. 1992) (district court erred in reasoning that since customers' only legitimate purpose for using defendant's diagnostic software was to repair computers, defendant was providing only a single integrated product of computer servicing, rather than a package of service and diagnostic software).

The Defendants argue that a different analysis is required in this case because it involves "overlap markets." They define "overlap markets" as a multicomponent package being sold in one market and one of those components being sold in a second market, and they contend that in such situations, courts have universally held that the package was a single product. We disagree that courts universally have so held. *See, e.g., Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 826 F.2d 712, 720 (7th Cir. 1987); *Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 593 F. Supp. 1506, 1515 (N.D. Cal. 1984), *aff'd*, 833 F.2d 1342 (9th Cir. 1987), *cert. denied*, 488 U.S. 870 (1988); *Metrix Warehouse, Inc.*

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[4] Product improvements may be the cause and/or effect of changes in consumer demand, but the nature of that demand is what counts.

v. Daimler-Benz Aktiengesellschaft, No. N-79-2066, 1982 WL 1870, at *6-9 (D. Md. June 4, 1982), *reinstated*, No. Civ. A.N. 79-2066, 1984 WL 1105 (D. Md. June 11, 1984). Moreover, we are not persuaded either that the "overlap markets" characterization does anything more than restate the problem, or that, if it does, the Supreme Court's *Kodak/Jefferson Parish* test is somehow less controlling in such cases than in any others.

PMBR maintains that by incorporating BAR/BRI and Gilbert into a package, the Defendants have "link[ed] two distinct markets for products that were distinguishable in the eyes of buyers." *Jefferson Parish*, 466 U.S. at 19.

PMBR's evidence includes the following:

1) Defendants stipulated that full-service courses and supplemental MBE workshops are in separate product markets.

2) Defendants have marketed their full-service course and their supplemental workshop as separate products, for separate fees, for over a decade and still offer Gilbert separately.

3) In Kansas, Ohio and Hawaii, HBJL and/or its licensees still offer the full-service course unbundled from Gilbert.

4) Prior to Defendants' bundling, not every full-service course customer chose to purchase a supplemental workshop; in Colorado, only one-third to one-half did so.

5) In the past, HBJL officials worked to keep their external Gilbert workshop separate and distinct in customers' minds from the HarBrace workshop within the full-service course, because many customers preferred to buy from two different companies to get multiple providers' perspectives on the MBE.

6) Defendants have not consolidated the operation of the full-service and supplemental courses; Gilbert continues to be administered and marketed separately.

7) One or more of Defendants' officers contemplated that the inclusion of the Gilbert workshop in the full-service course at no added charge would be only temporary.

8) Other bar review industry participants view full-service and supplemental MBE courses as separate products.

This evidence is sufficient to create a material factual dispute over whether there is enough consumer demand in Colorado for full-service courses without supplemental MBE workshops to make it efficient to sell the two separately. If there is, then the BAR/BRI-Gilbert package should be viewed as two products.

b. The Conditioning Requirement

The final element of an illegal tying arrangement is conditioning. For an illegal tie-in to exist, "'purchases of the tying product must be conditioned upon purchases of a distinct tied product.'" *Continental Trend Resources, Inc. v. Oxy USA, Inc.*, 44 F.3d 1465, 1481 (10th Cir. 1995)

(quoting *Fox Motors, Inc. v. Mazda Distribs. (Gulf), Inc.*, 806 F.2d 953, 957 (10th Cir. 1986)), *petition for cert. filed*, 63 USLW 3819 (U.S. May 8, 1995) (No. 94-1838). HBJL and CBR argue that this element requires a showing of coercion, and that by adding Gilbert to BAR/BRI in the summer of 1992 they did not force or coerce any BAR/BRI students to forgo PMBR's supplemental workshop; since they did not raise BAR/BRI tuition, the economic incentives remained the same as before.

The Defendants are correct with respect to the summer 1992 course, when the bundled BAR/BRI-Gilbert course cost the same as the separate BAR/BRI course had cost previously. It appears that Gilbert truly was free to BAR/BRI customers during that summer's session, so that no separate, tied purchase was involved.

HBJL and CBR do not address, however, the evidence that in the winter 1993 course they raised the tuition of the bundled course by $50, in part to cover some of the costs of providing Gilbert. Where the price of a bundled product reflects any of the cost of the tied product, customers are purchasing the tied product, even if it is touted as being free. *See Directory Sales Management Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 610 (6th Cir. 1987); 3 Phillip E. Areeda & Donald F. Turner, *Antitrust Law* ¶ 733a (1978) ("[T]he tie may be obvious as in the classic form, or somewhat more subtle, as when a machine is sold or leased at a price that covers 'free' servicing.").

PMBR has presented enough evidence to create a triable issue as to whether the tuition for the bundled BAR/BRI course covered some portion of the Gilbert costs in 1993, and therefore whether the conditioning element was satisfied. *See* Plaintiff-Appellant's App. at 207-08 (Summary). Summary judgment on the tie-in claim therefore was premature.

2. Section 1 Predatory Pricing Claim

PMBR has alleged that by packaging Gilbert with BAR/BRI for a nominal or no charge, HBJL and CBR engaged in predatory pricing, in violation of both section 1 and section 2 of the Sherman Act.

To establish a section 1 violation, PMBR must show a conspiracy to engage in short-term price cutting to secure long-term monopoly profits. *Instructional Sys. Dev. Corp. v. Aetna Casualty & Sur. Co.*, 817 F.2d 639, 649 (10th Cir. 1987). To be predatory, prices must be set below "an appropriate measure" of costs. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2587 (1993).[5] Because of the time value of the money lost

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[5] Unfortunately for litigants, neither the Supreme Court nor we have taken a position on which of various cost measures is the definitive one, although we have spoken of marginal and average variable costs as being relevant. *See Brooke Group*, 113 S. Ct. at 2588 n.1; *Instructional Sys.*, 817 F.2d at 648; *Pacific Eng'g & Prod. Co. of Nevada v. Kerr-McGee Corp.*, 551 F.2d 790, 797 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977).

through price cuts and the uncertainty involved in predatory pricing schemes, the Supreme Court has said such a conspiracy is rational only if the conspirators "have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-89 (1986); *cf. Brooke Group*, 113 S. Ct. at 2587-89 (discussing the elements of predatory pricing under Sherman Act section 2 and the Robinson-Patman Act).[6]

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[6] Separate from but closely related to the question of whether a defendant's acts are likely to succeed is the question of whether a defendant with a monopoly in one market would have any plausible reason to use its monopoly profits in that market to subsidize predation in a second market. *See Matsushita*, 475 U.S. at 596 (requiring a showing of plausible motive for predatory pricing and observing that "a conspiracy to increase profits in one market does not tend to show a conspiracy to sustain losses in another").

Here, where PMBR has presented evidence that it was probably the most likely challenger to the Defendants' monopoly in the Colorado full-service market, we cannot say as a matter of law that Defendants would find it economically irrational to price below cost in the MBE market for the summer 1992 course as part of a larger scheme, employing tie-ins and schedule conflicts, to monopolize the supplemental market, in order to discipline PMBR for refusing to allocate markets and to deprive PMBR of the resources necessary to continue its full-service market incursions.

The district court dismissed PMBR's predatory pricing claim because it found that the bundled BAR/BRI-Gilbert course was a single product, and PMBR had not alleged that the package was priced below cost. As noted above, however, we find that a factual dispute remains as to the existence of two products.

The parties do not appear to dispute for summary judgment purposes the joint action element of the conspiracy claim. Nor do Defendants disagree that in the summer 1992 course, they included Gilbert for free, a level below any measure of Gilbert's costs.[7] We see no evidence in the appellate record, however, of any below-cost pricing in the winter 1993 course, when tuition was raised by $50. *See* Plaintiff-Appellant's App. at 344 (Baseman Aff. Ex. 4.) The only Gilbert cost evidence we have located in the record shows that the cost of Gilbert materials was approximately $15 per person. *See id.* at 452, 458 (Davis Dep.).

HBJL and CBR argue that PMBR has failed to show any evidence that they are likely to be able to recoup, with interest, their losses from any alleged predatory pricing. As discussed infra in our review of the section 2 claims, we find that PMBR has adduced enough evidence of high entry

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[7] Although the record below is somewhat ambiguous, HBJL and CBR do not appear to seriously dispute on appeal that if the BAR/BRI-Gilbert package does comprise two separate products, then the relevant product for predatory pricing's cost-price analysis is the supplemental workshop, rather than the package.

barriers and other structural factors in the supplemental market to create a triable issue as to this element. We therefore conclude that summary judgment on the section 1 predatory pricing claim was premature.

3. Section 2 Attempted Monopolization of Supplemental MBE Course Market

PMBR alleges that HBJL and CBR attempted to monopolize the supplemental MBE workshop market by means of tying, predatory pricing, false advertising, and the creation of schedule conflicts. The district court dismissed the attempt claim after deciding that tying and predatory pricing could not have occurred because only a single product was involved, that any reasonable juror would find the inclusion of Gilbert in the BAR/BRI course to be a procompetitive product improvement, and that PMBR had failed to show a triable issue as to the existence of schedule conflicts and false advertising.

PMBR argues on appeal that summary judgment was inappropriate as to each type of anticompetitive act alleged. HBJL and CBR argue that the district court's reasoning was sound, and that, in addition, PMBR has failed to show the requisite dangerous probability that the Defendants will succeed in monopolizing the supplemental MBE workshop market.

To succeed on an attempted monopolization claim, PMBR must show: (1) relevant geographic and product markets; (2) specific intent to monopolize; (3) anticompetitive conduct in furtherance of an attempt to

monopolize; and (4) a dangerous probability of success. *See TV Communications Network, Inc. v. Turner Network Tel., Inc.*, 964 F.2d 1022, 1025 (10th Cir.), *cert. denied*, 113 S. Ct. 601 (1992). The parties do not appear to contest the first and second elements for summary judgment purposes. We proceed, therefore, to examine the evidence with respect to conduct and probability of success.

a. Anticompetitive Conduct

Anticompetitive or exclusionary conduct under section 2 is "conduct constituting an abnormal response to market opportunities. Predatory practices are illegal if they impair opportunities of rivals and are not competition on the merits or are more restrictive than reasonably necessary for such competition," if the conduct appears "reasonably capable of contributing significantly to creating or maintaining monopoly power." *Instructional Sys.*, 817 F.2d at 649 (citations omitted). A defendant may avoid liability by showing a legitimate business justification for the conduct. *See Kodak*, 504 U.S. at 483.

(1) Tying and Predatory Pricing

As discussed above, PMBR has shown enough evidence to create triable issues as to the existence of a predatory pricing conspiracy in 1992 and a tying arrangement in 1993 in violation of section 1. Illegal tie-ins and predatory pricing under section 1 may also qualify as anticompetitive conduct for section 2 purposes. *See, e.g., Directory Sales*, 833 F.2d at 613; *Great Escape, Inc. v. Union City Body Co.*, 791 F.2d 532, 541 (7th Cir. 1986); *Heatransfer Corp. v.*

Volkswagenwerk, A.G., 553 F.2d 964, 981 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978); *see also* Areeda & Turner, *supra* ¶ 733c.

HBJL and CBR offer three justifications, however, which they say made the inclusion of Gilbert "for free" as part of the BAR/BRI course permissible competitive activity. First, they argue that since supplemental MBE workshops were being offered "for free" as part of full-service courses in Colorado by SMH and outside Colorado by PMBR, SMH, and other providers, they (HBJL and CBR) were entitled to meet their competitors' prices, even if those prices were predatory. Second, they contend, they were entitled to use legal and ordinary marketing methods such as bundling to respond to PMBR's and SMH's "attack" advertisements, which criticized Defendants for charging "extra" for their MBE workshop. Third, they argue, the bundling of Gilbert with BAR/BRI was a procompetitive improvement of their full-service course.

(a) Meeting competition

Determining when the meeting-competition defense properly applies to a predatory pricing claim can require substantial analysis. *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 717′ (Supp. 1994). But Defendants have not shown, at any rate, why they should be allowed to price Gilbert below cost in Colorado in order to meet PMBR's prices in California, Alabama, Tennessee, and Georgia. And PMBR has offered enough evidence to create a triable issue regarding whether HBJL and CBR were truly

concerned about and responding to competition from SMH. *See* Plaintiff-Appellant's App. at 203 (Summary).

(b) Ordinary marketing methods

HBJL and CBR say their "free" inclusion of Gilbert in the BAR/BRI course was nothing more than one of the "legal and ordinary marketing methods already used by others in the market" that we have previously said even monopolists are free to use. *See Telex*, 510 F.2d at 927. We do not necessarily read *Telex* to mean that absolutely every marketing method available to any nonmonopolist is equally proper when used by a monopolist, since such a reading might eliminate the law on tying arrangements. But in the supplemental MBE market, where HBJL and CBR were not monopolists, they may have been at liberty to temporarily engage in promotional pricing--even giving Gilbert away free--to try to boost the sales of a product that consumers were rejecting. A problem in this case, however, is that they did not offer Gilbert free to every prospective Gilbert customer. Instead, they offered it free only to purchasers of their monopolized BAR/BRI course. Although, as we noted above, this could not have constituted an illegal tying arrangement in 1992 because the allegedly tied Gilbert product was not purchased, neither can we find this linking of a product giveaway to monopoly power in a separate market to be a legal and ordinary marketing method, absent some showing of legitimate business reasons for distinguishing the BAR/BRI customers from other purchasers

of Gilbert.[8] *See SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1059-62, 1065 (3d Cir. 1978), *cert. denied*, 439 U.S. 838 (1978).

(c) Product improvement

Product improvement can sometimes be a defense to a section 2 claim.[9] *See, e.g., Telex*, 510 F.2d at 906, 926-27; *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423, 443-44 (N.D. Cal. 1978), *aff'd sub nom.*

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[8] We recognize the split among the circuits regarding the legality of so-called "monopoly leveraging," i.e., using a monopoly in one market to gain a competitive advantage in a second, where the purpose is not to monopolize or attempt to monopolize the second market. *Compare, e.g., Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275-76 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), *with Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 546-49 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1603 (1992). Our case falls outside this debate, however, because PMBR has specifically alleged an attempt to monopolize the supplemental MBE workshop market.

[9] It may seem contradictory that a product improvement motivation--at least without something more, such as demonstrated efficiencies--will not save an otherwise illegal tying arrangement under section 1, *see Jefferson Parish*, 466 U.S. at 25 n.41, but it may still weigh in the balance in section 2 analysis. The two sections are distinct, however, and the section 2 balancing test is different from the analysis for per se offenses under section 1.

Memorex Corp. v. IBM Corp., 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981). PMBR argues, however, that the Defendants' product improvement justification at most creates a factual dispute. PMBR contends that its evidence shows that the claimed improvement was neither intended as an improvement nor accepted by the market as one.

Both the purpose and results of a product change, including customers' reception of the change, are relevant to whether a claimed product improvement is pro- or anticompetitive.[10] *See In re IBM Peripheral EDP Devices*

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[10] Professors Areeda and Hovenkamp, who argue for a rule of presumptive legality for all product changes, concede the possible anticompetitive nature of what they term "implicit tying" through product integration. *See* Areeda & Hovenkamp, *supra* ¶¶ 738.1 & 738.4. But they say an inquiry into whether a defendant's intent was actually to harm rivals, as distinct from making a better product, is difficult, costly, and usually pointless, because the evidence is frequently mixed or ambiguous. *See id.* ¶ 738.4e. And they say an objective appraisal of whether a product change truly is an improvement--let alone whether a given improvement could have been achieved with less harm to competition--will often be beyond the courts' competency and may seriously chill innovation. *See id.* ¶ 738.4f.

We are sensitive to both the difficulties and the dangers of these inquiries. Where, as here, however, the claimed product improvement takes the form of a marketing change, rather than some complex technological integration of previously separate

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Antitrust Litig., 481 F. Supp. 965, 1003-05 (N.D. Cal. 1979), *aff'd sub nom. Transamerica Computer Co., Inc. v. IBM Corp.*, 698 F.2d 1377 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983). *But see Telex Corp. v. IBM Corp.*, 367 F. Supp. 258, 347 (1973) (refusing to second-guess technological justifiability of integrating more internal memory into computer's central processing unit where integration reduced costs and increased utility), *rev'd on other grounds*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975).

1) Purpose of product change

PMBR has offered evidence that the bundling was a response to PMBR's refusal to take part in a proposed market allocation agreement, *see* Plaintiff-Appellant's App. at 193-94 (Summary); that Defendants' executives never have believed that bar applicants need Gilbert to pass the bar, *id.* at 201 (Summary); that Defendants intended the bundling to be only temporary, *id.* at 199 (Summary); and that bundling cannot reasonably be explained as a response to competitive market conditions where, prior to the bundling of Gilbert, Defendants' course already had more MBE workshop hours than SMH's full-service course, and where SMH's then-

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[10](...continued)

functions, our degree of deference to product designers is reduced.

partner, Kaplan, went bankrupt around the time the Gilbert bundling began in Colorado. *Id.* at 203 (Summary).

2) Customer reception of product change

PMBR also cites evaluations from bar applicants in California and elsewhere outside of Colorado, in the summer of 1992, who described the "free" Gilbert sessions as "horrible," "a waste of time," "awful" and "a joke." *See id.* at 201-02 (Summary).[11] PMBR offers evidence that immediately prior to bundling, one-half to two-thirds of Colorado bar applicants who took a full-service course did not choose to take a supplement, *see id.* at 189-90 (Summary), and that many prefer to take their MBE workshop from a different provider than their full-service company. *See id.* at 547 (Reed Dep.).

3) Results of product change

PMBR further argues that if the addition of Gilbert had actually improved the product, one would expect Defendants' share of the full-service market and the pass rate of its course enrollees to have increased, but in fact they declined. The Defendants' market share--as measured by the percentage of first-time Colorado bar exam takers taking the

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[11] While the evaluations are not from Colorado students, neither side has suggested they are irrelevant because either the Gilbert course or the students taking it are different in Colorado than elsewhere.

BAR/BRI course--dropped from 76 percent in 1991 to 72 percent in 1993, *see id.* at 336-37 (Baseman Aff. Ex. 2), and BAR/BRI customers' pass rate declined from 5 percentage points above the Colorado average in July 1990 to 1 percentage point above the state average in July 1992. *See id.* at 413-14 (Sullivan Aff. Exs. 12, 13).

Taken together, the preceding evidence is enough to create a triable issue regarding the validity of the Defendants' product improvement justification for the alleged tying and predatory pricing behavior. In sum, PMBR has sufficiently controverted for summary judgment purposes the arguments that the Defendants were only responding to competition, that they used nothing more than legal and ordinary marketing methods, and that the bundled course was a procompetitive product improvement.

(2) Schedule Conflicts

PMBR also claims the Defendants deliberately created scheduling conflicts between the BAR/BRI course and PMBR's workshop in furtherance of their attempt to monopolize the workshop market. PMBR offers evidence of increased numbers of schedule conflicts nationwide, e.g., 23 conflicts in the summer of 1990, 2 of them major, versus 37 conflicts in the summer of 1992, 17 of them major, *see* Plaintiff-Appellant's App. at 206 (Summary); *id.* at 370-71 (Feinberg Aff.); and three specific conflicts in Colorado, in the summer 1991, winter 1991 and summer 1992 courses. *Id.* at 366-68.

PMBR contends that the increased conflicts were intended to discourage people from taking PMBR's workshop. The district court held that where PMBR's workshop ran from 9 a.m. to 4 p.m., and the Defendants' classes ran from 6 p.m. to 9 p.m., no reasonable juror could find that any schedule conflicts existed. HBJL and CBR further point out that BAR/BRI students who wished to attend PMBR's course could check out audiotapes of the BAR/BRI lectures at any time or attend videotape replays at various locations.

PMBR argues on appeal that the court erred in concluding that to be actionable, the schedule conflicts had to make it impossible, rather than merely inconvenient, for BAR/BRI students to take PMBR's workshop. We agree. The relevant inquiry is whether the Defendants' scheduling patterns were anticompetitive, i.e., "an abnormal response to market opportunities . . . impair[ing] opportunities of rivals and . . . not competition on the merits or . . . more restrictive than reasonably necessary for such competition." *Instructional Sys.*, 817 F.2d at 649. What matters is not so much whether the classes actually overlapped as whether the scheduling pattern was reasonably capable of contributing significantly to a monopolization attempt by discouraging BAR/BRI customers from taking PMBR's course, and, if so, whether it was nevertheless justified.

PMBR presented enough evidence to create a triable issue as to whether this same-day scheduling could significantly discourage BAR/BRI students from taking its workshop. *See* Plaintiff-Appellant's App. at 365-72 (Feinberg

Aff. ¶¶ 41-63).[12] The Defendants contend, however, that even if there were conflicts, they were justified, because the

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12 Defendants argued below that they had no duty to accommodate PMBR's scheduling. They analyzed the situation as a monopolist's refusal to cooperate with a competitor and read *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 603 (1985), as standing for the proposition that a monopolist has a duty to assist a competitor only where the monopolist has accommodated the competitor in the past and then abruptly terminates assistance. We do not necessarily interpret *Aspen Highlands* as narrowly as do the Defendants, but principles governing refusals to deal do not control here anyway.

PMBR's complaint goes beyond merely alleging that Defendants refused requests to affirmatively accommodate PMBR's course. PMBR alleges that the Defendants deliberately created schedule conflicts to avoid helping PMBR, and in fact, to harm PMBR. Since the Defendants naturally would not create conflicts between their BAR/BRI full-service course and their own MBE workshop, Gilbert, *see* Plaintiff-Appellant's App. at 370 (Feinberg Aff. ¶ 58), there is a triable issue as to whether schedule conflicts between BAR/BRI and PMBR's MBE workshop would disproportionately raise PMBR's costs. *See Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n Inc.*, 814 F.2d 358, 368 (7th Cir. 1987) (citing Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L.J. 209 (1986)). This would qualify as anticompetitive conduct unless HBJL and CBR could demonstrate a legitimate business justification for it.

overwhelming likelihood "is that any same-day scheduling was the inevitable result of two courses attempting to shoehorn their complex schedules into the same narrow time frame." Defendants-Appellees' Br. at 28.

PMBR offers circumstantial evidence that the three schedule conflicts it has identified in Colorado were not accidental or inevitable, but instead deliberate and unjustified. PMBR points to a substantial increase nationwide in the number of conflicts after HBJL's Mr. Conviser allegedly proposed the illegal market allocation agreement in 1989 and PMBR's Mr. Feinberg rejected it in the spring of 1990. Mr. Feinberg stated by affidavit that there have always been conflicts between PMBR's course and that of BAR/BRI and its licensees, including CBR, but the vast majority were minor or inconsequential until 1991 and thereafter. *See* Plaintiff-Appellant's App. at 366-72 (Feinberg Aff. ¶¶ 47-63). This sequence of events is enough to create a jury question as to whether the disputed schedule conflicts in Colorado were deliberate or the "inevitable result" of crowded curricula and short time frames.

(3) False Advertising

PMBR contends that Defendants advertised falsely when they advertised that their BAR/BRI course included the Gilbert workshop "for free." In 1993, PMBR points out, Defendants raised the price of the BAR/BRI course by $50, and an HBJL official testified that the added cost of Gilbert was one of the reasons for the tuition increase. *See id.* at 207-08 (Summary). The district court found no triable issue,

because Gilbert was being offered as part of the full-service course and, "I guess that is free to that extent." *Id.* at 313 (Tr. Summ. J. Hr'g).

We affirm for a different reason. Even assuming the advertising was false, PMBR has not shown how it could have contributed to an attempt to monopolize the supplemental MBE market, rather than just to maintenance of Defendants' full-service course monopoly. PMBR has not adduced any evidence that had BAR/BRI enrollees known the alleged "truth"--that they were not getting Gilbert for free but were being forced to pay for it in order to get the desired BAR/BRI course--they would have been more likely to spend another $300 or so to take PMBR or another MBE workshop in addition to the BAR/BRI-Gilbert course. We therefore affirm the district court's rejection of false advertising as an anticompetitive act in furtherance of the attempted monopolization claim.

b. Dangerous Probability of Success

As an alternative basis for affirming the district court's dismissal of the attempted monopolization claim, HBJL and CBR argue that PMBR has failed to demonstrate a dangerous probability that their alleged attempt will succeed. PMBR contends that it has provided ample evidence.

"To establish the dangerous probability of success element of an attempted monopolization claim, 'the plaintiff must show that there was a dangerous probability the defendant would achieve monopoly status as the result of the

predatory conduct alleged by the plaintiff.'" *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 894 (10th Cir. 1991) (quoting *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America*, 885 F.2d 683, 693 (10th Cir. 1989), *cert. denied*, 498 U.S. 972 (1990)). Factors relevant to determining dangerous probability include, but are not limited to, a defendant's market share, whether the defendant is a multimarket firm, the number and strength of other competitors, market trends, and entry barriers. *See id.*; *Shoppin' Bag of Pueblo, Inc. v. Dillon Cos.*, 783 F.2d 159, 162 (10th Cir. 1986). Where predatory pricing is alleged, the defendants' financial strength and ability to absorb losses are also relevant. *See Brooke Group*, 113 S. Ct. at 2589; *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 119 n.15 (1986). Because we are talking about probabilities, it is not necessary for a defendant to already possess monopoly power in the target market; indeed, if it did, the offense would be monopolization, not attempt. Of course, "[t]he higher the firm's initial market share, the greater the likelihood that it will eventually gain monopolistic control over the market." *Colorado Interstate Gas*, 885 F.2d at 694.

(1) Defendants' Market Share/Multiple Markets

"The [market] share that is relevant for determining whether the defendant can satisfy the 'dangerous probability of success' requirement of attempted monopolization should be either that which he possesses at the time of litigation or the largest share he possessed during the period of the al-

leged offense." Areeda & Hovenkamp, *supra* ¶¶ 711.2d, 835.2b.[13] No specific minimum market share is universally accepted. But in this case, the Defendants stipulate that they possess monopoly power in the full-service course market, which is closely related to the target supplemental workshop market; they are accused of leveraging that power to increase their share of the supplemental market; their share of the supplemental market went from less than 2 percent in the winter of 1992 to more than 70 percent within a year, while the share of their major competitor, PMBR, went from 84 percent to 23 percent in the same period (and from 22,000 nationwide in 1990 to 14,000 in 1992).[14] *Fiberglass Insula-*

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[13] Professors Areeda and Turner, in their earlier, 1978 main volume, said some courts have required a showing that a defendant possessed a significant share of the target market at the time when the challenged conduct was undertaken, and they cite, inter alia, to one of our cases as standing for that proposition. *See E.J. Delaney Corp. v. Bonne Bell, Inc.*, 525 F.2d 296 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976) (cited in *Areeda & Turner, supra* ¶¶ 831, 835a). We do not read *Delaney* as clear support for such a rule, but even if it were, we would hold it distinguishable from this case, where the Defendants are accused of leveraging their monopoly power in a second market to gain a new monopoly in the target market.

[14] The Defendants complain that PMBR arrived at the high market share for them by counting every sale of the Defendants' full-service course as a sale of a supplemental MBE workshop after the Gilbert inclusion in the summer of 1992. But they do not

(continued...)

tors, Inc. v. Dupuy, No. Civ. A. 84-1244-1, 1986 WL 13356 at **3-4 (D. S.C. Sept. 30, 1986) (denying summary judgment on attempted monopolization claim where defendant's market share increased from 5 percent to nearly 51 percent in four years); *Indiana Grocery Co. v. Super Valu Stores, Inc.*, 647 F. Supp. 254, 258 (S.D. Ind. 1986) (refusing to dismiss attempted monopolization case for failure to state a claim where defendant, a new market entrant with extensive resources, obtained a 15 percent market share in 18 months).

(2) Defendants' Resources

PMBR has presented evidence that Defendants have access to substantial money with which to sustain a predatory campaign. HBJL's parent company, General Cinema, had total assets of over $5.5 billion as of Jan. 31, 1993, compared with PMBR's assets of less than $1.042 million as of June 30, 1993. *See* Plaintiff-Appellant's App. at 200 (Summary).

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[14](...continued)

show why this is conceptually wrong, at least for 1993, when the evidence shows that part of the fee increase charged to enrollees was to cover Gilbert costs, so that we can fairly call the Gilbert enrollments "sales." At any rate, we accept PMBR's numbers for summary judgment purposes. *See Kodak*, 112 S. Ct. at 2076-77.

(3) Number and Strength of Competitors

PMBR's market structure evidence suggests that if PMBR is seriously damaged or eliminated, remaining competitors in the supplemental market may not be able to compete effectively against Gilbert. The Colorado supplemental MBE market is highly concentrated, dominated by PMBR and the Defendants. The other two competitors--APTS and Reed Law Group--have been relatively weak in Colorado. In 1993, Defendants had 76.2 percent of the market; PMBR had 22.6 percent, and APTS had 1.2 percent. *Id.* at 339 (Baseman Aff. Ex. 3). Reed cancelled its 1993 workshops. *Id.* at 361 (Feinberg Aff.). SMH offered a workshop in 1991, but it is unclear to us whether they still compete in the supplemental market.

(4) Market Trends

The trends in the supplemental MBE market, as reflected in PMBR's evidence, provide additional support for PMBR's claim. PMBR's market share increased from 71 percent to 84 percent between 1989 and 1991, but dropped to 25 percent in 1992 and to 23 percent in 1993. The Defendants' market share showed an opposite trend, dropping from 29 percent to 11 percent between 1989 and 1991, then increasing to 72 percent by the end of 1992 and 76 percent in 1993. Figures for the third competitor, APTS, available for 1991-93, showed a steady decline from 4 percent in 1991 to 1 percent over that period.

(5) Entry Barriers

PMBR has also offered evidence that if PMBR is eliminated, new market entrants may not be able to establish a competitive MBE workshop market. PMBR's economic expert testified that entry barriers exist in both the full-service and the supplemental MBE markets in Colorado, because of Defendants' high degree of name recognition and accumulated goodwill, HBJL's large size nationwide, HBJL's economies of scope and scale in the full-service market, and the widespread discounting practices of the bar review industry. *See id.* at 323-24 (Baseman Aff.). PMBR has presented further evidence of entry barriers in that there have been only three attempted entries in the Colorado supplemental MBE market since 1972, two of them largely unsuccessful. *Id.* at 192 (Summary), 361 (Feinberg Aff.).

The preceding evidence of the Defendants' market share and resources, the nature of the competition they face, and the barriers to entry in the supplemental workshop market, are sufficient to create a material factual dispute with regard to dangerous probability of success. A jury question exists as to whether HBJL and CBR, by predatorily pricing Gilbert sales to BAR/BRI customers in the summer 1992 course and then subsequently tying the BAR/BRI course to purchases of Gilbert, and by creating scheduling conflicts with PMBR's course, could so harm PMBR and other MBE providers that HBJL and CBR could monopolize the MBE market and maintain that monopoly long enough to recoup any predatory pricing losses plus interest. Although many

subissues are subject to seriou factual dispute, summary judgment on the attempt claim was premature.

4. Section 2 Conspiracy to Monopolize Supplemental MBE Market

PMBR next contends that the district court erred in dismissing its section 2 claim of conspiracy to monopolize the supplemental MBE market, because all of its elements except one--the existence of a conspiracy--are subsumed in the attempt claim, and it has provided evidence of the conspiracy element as well.

To succeed on a claim of conspiracy to monopolize, PMBR must show: "(1) 'the existence of a combination or conspiracy to monopolize'; (2) 'overt acts done in furtherance of the combination or conspiracy'; (3) 'an effect upon an appreciable amount of interstate commerce'; and (4) 'a specific intent to monopolize.'" *TV Communications*, 964 F.2d at 1026 (quoting *Olsen v. Progressive Music Supply, Inc.*, 703 F.2d 432, 438 (10th Cir.), *cert. denied*, 464 U.S. 866 (1983)).

As to the conspiracy element, PMBR has presented evidence that major decisions regarding the Colorado course, such as pricing and course content, required the approval of HBJL as well as CBR. *See* Plaintiff-Appellant's App. at 206-07 (Summary); *id.* at 455 (Davis Dep.). We agree that this evidence, when combined with the evidence supporting the attempt claim, creates a triable issue and precludes summary judgment on the conspiracy claim.

5. Monopolization of and Conspiracy to Monopolize Full-Service Bar Review Market

PMBR alleges that HBJL and CBR were guilty of Sherman Act section 2 monopolization of and conspiracy to monopolize the full-service bar review market by means of a geographic market allocation agreement, which is illegal per se under section 1.

HBJL and CBR reply that PMBR lacks standing, that a 1990 release agreement and the statute of limitations bar this claim, and that PMBR has not presented evidence that an illegal market allocation agreement ever existed. The district court appears to have relied on the 1990 release agreement in dismissing this claim. Although the court also mentioned the statute of limitations, it does not appear to have made a specific finding based on it. We conclude that PMBR has failed to establish a triable issue regarding the existence of an illegal agreement.

Defendants correctly argue that ambiguous conduct that is as consistent with permissible competition as with illegal conspiracy does not by itself support an inference of antitrust conspiracy under Sherman Act section 1. *Matsushita*, 475 U.S. at 588. A plaintiff must offer evidence tending to exclude the possibility that the alleged conspirators either acted independently or colluded in a way that could not have harmed the plaintiff. *Id.*; *Gibson v. Greater Park City Co.*, 818 F.2d 722, 724 (10th Cir. 1987).

We agree with the Defendants that the mere fact that they were competitors before their licensing arrangement and

stopped competing afterward is not enough to show that they secretly and illegally divided the market between them. Their written agreements contained no noncompete clauses, but once they entered their licensing arrangement, both companies had legitimate business reasons not to compete and undermine the BAR/BRI trademark's value.

Also ambiguous is the evidence that CBR's founder, Jerry Kopel, once threatened to offer competing bar review courses outside Colorado if HBJL did not give him more favorable license terms, but that he ultimately did not carry out his threat. This can be read, as PMBR reads it, to mean that Mr. Kopel was threatening to violate an existing secret agreement not to compete, but it also can be viewed as the normal posturing that occurs in any contract renegotiations.

Nor do we consider that the balance is tipped by the evidence that HBJL entered into an explicit market allocation agreement with a former competitor in Georgia in 1980, *see Palmer*, 498 U.S. at 49-50, and that it proposed market allocation agreements to Josephson's Bar Review in 1969, to SMH Bar Review in 1976 and 1980, and to PMBR in 1989-90. The timing of these various offers permits two opposite inferences to be drawn. Although PMBR insists that this evidence shows a consistent pattern of behavior, all of the alleged offers were made before November 1990. In that month, the Supreme Court ruled in *Palmer* that HBJL's market allocation agreement with BRG was "unlawful on its face." *Id.* at 50. It is clearly possible to infer that in 1991, when HBJL and CBR orally renewed their Colorado licensing agreement, they were aware of the illegality of any

market allocation agreement and did not pursue or renew any such agreement.

Since all of PMBR's evidence relative to the existence of a secret market allocation agreement is ambiguous, it cannot support an inference of conspiracy to monopolize the full-service course market, and we affirm the district court's dismissal.[15]

B. CONFIDENTIALITY ISSUES

PMBR appeals the district court's refusal to set aside under Fed. R. Civ. P. 72(A) a magistrate judge's orders concerning disclosure of confidential information in the record. The basis for the court's ruling is not clear, but because we are remanding the case, this order becomes interlocutory and

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[15] Although the 1990 settlement agreement released any claims PMBR might have had against HBJL based on pre-1990 activities, PMBR contends that it still has a cause of action for that time period against CBR, which was not a party to the settlement. But even assuming that CBR is not protected by the 1990 release, PMBR's evidence that HBJL proposed or entered into market allocation agreements with other companies in other states in 1969, 1976, 1980, and 1989, without more, is simply too remote to furnish the basis for a conspiracy claim against CBR on grounds that CBR and HBJL, or their predecessors, allocated the Colorado and Wyoming markets in 1974, 1982, 1986, and 1988. (The latter dates are the years when CBR made or renewed its written license agreements.)

subject to reexamination upon renewed motion by PMBR. We therefore decline to address it at this juncture.

IV. CONCLUSION

For the reasons discussed above, the district court's judgment is REVERSED IN PART, AFFIRMED IN PART, and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92-z-2330

MULTISTATE LEGAL STUDIES, INC.,

Plaintiff,

vs.

HARCOURT BRACE JOVANOVICH LEGAL AND PROFESIONAL PUBLICATIONS, INC., *et al.*,

Defendants.

REPORTER'S TRANSCRIPT

(Hearing on Motion for Summary Judgment)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the

District of Colorado, commencing at 8:50 a.m., on the 3d day of March, 1994, in Courtroom C-502, United States Courthouse, Denver, Colorado.

. . . .

RULING

THE COURT: This has not been a simple issue on summary judgment. Frankly, it's not simple, because before coming into the argument, the Court often has a predisposition on paper of how the case should go. This is a case where I did not have a predisposition on paper. I wanted to hear the argument, because it seemed to me that there were some very weighty arguments in favor of granting the motion for summary judgment: The fact that as a matter of policy, you want to promote innovation. As a matter of almost common sense, preparation for the bar exam is preparation for the bar exam, and the market is preparation for the bar exam, whether it be the MBE or the essay part of the bar exam.

It seemed to me that defendant had a lot of very weighty policy, common-sense arguments on their side, which would indicate to the Court that there is some real questions whether this type of action really continues or promotes competition or inhibits competition, because we know that in this country, the antitrust laws are there for the purpose of promoting competition and not inhibiting competition.

There is a lot of cases that have been cited for a lot of things and issues raised by both sides. The plaintiff has certainly raised questions of whether there is a factual issue on 1, 2, 3, 4, 5 -- I don't know how many things that Ms. Sullivan went through, but she went through many areas where she feels and she argued strongly and persuasively that there is factual issues that a jury could find. Factual issues: Was this really a tying of two products; was this done with the motive of getting rid of the competitor?

So I've listened to the argument, and I've tried to clarify my thoughts while I'm hearing it.

One thing is clear to me. Let's start with that: The Illinois agreement -- I've forgotten the date of it again -- the Illinois agreement, which is February 17 -- is that correct? What's the date? July 17 of 1990 -- applies not only to defendant licensor but also to the defendant licensee because of the agreement. It's difficult for me to see how as a matter of law that agreement would not bind the licensee of the defendant Harcourt; so clearly on that point, I see very little dispute that we're not talking about any agreements or any causes of action accruing before that date of the agreement, the 1990 date.

I think common sense policy does certainly enter into antitrust decisions; and we have a case here where we must consider whether this action, if it's a valid action, indeed promotes competition or inhibits the competition; whether the preparation for the bar exam is really what is being offered to the students, the full service, which is preparation for the

whole bar exam. And that indeed is the stipulation which the plaintiff is held to in the pretrial order: That a full service bar review course is designed to prepare students for all components of that jurisdiction's bar exam.

And the question is when defendant takes the supplemental course that had been offered separately and makes it a part of their full service program, is indeed that an improvement of the full service as a matter of law for this court to decide, or is this action which is for the purpose of quashing their competition and getting rid of the plaintiff as a competitor?

I've looked at all the papers filed, most of the cases. There is a lot of them, and I've come to this conclusion as a matter of law, because it has to be a matter of law in deciding a motion for summary judgment: Indeed it seems to me that the stipulation is there and says what it means: Full service bar review is designed to prepare students for all components of the bar examination. It seems to me that what is being offered by full service is preparation for the bar exam, which includes not only the essay part but the multistate part.

Under the present system, the students do have a choice. There are many students who will take only the multistate part because they did well in law school, they're sure they can pass the multistate, and they have the choice of taking the plaintiff's supplement or taking only the defendant's supplement, only the -- whatever it is, 295, or whatever it's called -- whatever it costs.

If they are less sure of themselves, they'll take the full service, which includes the -- which includes the defendants' supplement as part of the full service.

If they're less sure of themselves, they'll take the full service from the defendant with the defendants' supplement and they'll also take the plaintiff's supplement. And many students probably do that.

It really makes good sense to this court that what we have here is an effort to improve the full-service bar exam. I find that as a matter of law. It also seems to me to make good common sense and to promote the policy of allowing a competitor to improve the product and to improve it in innovative ways by incorporating certain things into their product in order to help the student pass the bar exam.

I believe that this indeed is a product improvement of the full service bar exam; and therefore, it is covered by *Telex*.

We have a question of motive. That is certainly a concern of the court. But motive is not something that alone makes a violation of the antitrust laws; and indeed in the Tenth Circuit case of *Rural Telephone vs. Feist*, which is 957 F.2d 765, the Court says that "the desire to crush a competitor standing alone is insufficient to make out a violation of antitrust laws."

In this case, I'm not sure that I have any strong conviction that the plaintiff would be able to prove this desire

to crush a competitor as the reason for the change and the improvement of the full service course.

So the Court does indeed in applying the antitrust laws want to promote competitive products, want to promote innovation, want to promote the type of improvement that I think we see here; and I just have real problems in saying -- in finding that there is anything that has been raised factually that a reasonable juror could consider which would lead to a contrary result. It seems to me that what we do indeed have here is a legal basis for granting the motion for summary judgment and for saying that no reasonable juror could come to a different conclusion.

The Court therefore will at this time -- and let me just add, because something has been said about this scheduling conflict. Unless -- if this had been a case where the defendant had set their courses for the same time as PMBR's classes, you know, then maybe we'd have really a scheduling conflict. But they're different times. And when students are studying for the bar, they study all day long; and if they don't quit at 4 and start another course at 6, they may be quitting a course and going home and studying at 6, or earlier.

So the fact that one course ends at 4 and another begins at 6, it seems to me cuts against the plaintiff's argument that there is a scheduling conflict, does not help them. There is no scheduling conflict.

The Court at this time for the reasons stated finds that this is a case which falls under the *Telex* case. This is a case

which does not involve -- well, which involves an overall one-product system of helping the student to pass the bar exam, which is the full product -- full-course -- full-service bar review course, which is what we're talking about. There has been the supplemental situation, it was stipulated; but I think that as a matter of law, that does not -- that stipulation does not prevent the supplementation of the full service bar.

Accordingly, the motion for summary judgment will be granted. The judgment will be entered in favor of defendants and against plaintiff for dismissal.

The case then will be, if plaintiff so desires -- will be considered by the Tenth Circuit; and we'll see what they want to decide.

That's how I see it. I see it strongly.

Before I recess, I would like to give both sides an opportunity to see if there are any additional conclusions that you would like the Court to consider in making this order; and the order may be ordered from the reporter for purposes of appeal.

I would like to do a separate order on this case, if I have time. I certainly will, but I have two other very large cases under advisement which I'm really pressed to get out, so this is a poor third priority in getting something in writing.

I think I've spelled out my reasons on the record. I hope I have sufficiently that the court of appeals, if you desire to appeal it, will understand.

MR. TRAUTMAN: Your Honor, there are some counts that you have not specifically addressed. I think they're subsumed in your overall order.

THE COURT: Let's talk about it. I think I covered the tying.

MR. TRAUTMAN: You've covered tying, predatory pricing.

THE COURT: Predatory pricing.

MR. TRAUTMAN: You've covered scheduling, you've covered the release on the license agreements.

The one that you didn't mention, I think, was false advertising.

THE COURT: As a matter of law, the Court is not able to say that there is a count for false advertising here. Indeed, the three-day component is being offered as part of the full service; and I guess that is free to that extent. I don't think it is false advertising. The Court's feeling on that is that that issue also should be taken care of as a matter of law and dismissed.

MR. TRAUTMAN: One last one, I believe, that follows from your finding of no predatory pricing is the price-fixing, which depends on predatory pricing; so we think that that would follow, too. I just wanted to mention that.

THE COURT: I think the price fixing depends on predatory pricing and falls also; and as I indicated, if we're

talking about something that happened prior to the agreement, that that agreement in Illinois covers both defendants.

Do we have anything else? Statute of limitations? I think that's covered by my rulings.

Standing. I think that's also covered by the rulings.

Is there anything else, Ms. Sullivan, that you want covered?

MR. [sic] SULLIVAN: There is one last issue, and that is that the defendants have counterclaims; and as I understand the way things have fallen out today, the only thing which would remain is the counterclaims, which are state law issues. So we would just ask that the counterclaims be dismissed as well.

THE COURT: Are the defendants willing to dismiss the counterclaims so this case can be terminated?

MR. TRAUTMAN: Yes, your Honor.

THE COURT: While those claims remain, I've got to hear them and it can't go up on appeal.

MR. TRAUTMAN: Yes, your Honor.

THE COURT: All counterclaims are dismissed.

What else?

Costs. Let's talk about costs for a minute.

It appears to me -- the normal rule is that the winner has costs paid, unless the Court otherwise orders; and it

appears to me that this has been a close argument, although I think that I have no real doubt about the defendant maintaining their position. But in this particular case, because of the arguments, it appears to me a case where each side should pay its own costs, each party should pay its own costs. And the Court will so order.

Anything else left over? Any other loose ends?

MR. FABRIKANT: Does your Honor mean that your Honor is not going to be issuing a written opinion other than the order which you've just read into the record?

THE COURT: I'm incorporating by reference what I say. What is on the record is the opinion; and you can order that, and that will be the opinion for purposes of appeal.

MR. FABRIKANT: And the judgment is being entered today, your Honor, for purposes of appeal?

THE COURT: The judgment of dismissal will be entered today. The appellate time will start running today, unless you have some agreement to the contrary. I'm happy to hear if you have an agreement to the contrary.

MR. TRAUTMAN: No agreement.

MR. FABRIKANT: Not thinking we'd lose, your Honor, we didn't have that discussion.

THE COURT: All right.

MR. FABRIKANT: Thank you, your Honor.

MR. TRAUTMAN: Thank you, your Honor.

THE COURT: Let me check.

The reporter says that he can get the transcript to you within a very short time, so I don't think that's going to be a problem or hinder your appeal.

MR. FABRIKANT: Thank you, your Honor.

THE COURT: Thank you. Court is in recess.

(Discussion off the record.)

THE COURT: I want to make sure that we have a record on this: It is stipulated that should this court be reversed on appeal and the case be remanded back, the counterclaims would be in full force and effect, reactivated, and that is agreed.

MR. FABRIKANT: So stipulated.

THE COURT: So with that, they're dismissed without prejudice -- I'm sorry -- with prejudice, except with that condition.

. . . .

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Dated at Denver, Colorado, this 7th day of March, 1994.

s/Paul A. Zuckerman
Paul A. Zuckerman

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MULTISTATE LEGAL STUDIES, INC., a Delaware corporation,	)	
Plaintiff-Counter-Defendant-Appellant,	)	
	)	No. 94-1148
v.	)	
HARCOURT BRACE JOVANOVICH LEGAL AND PROFESSIONAL PUBLICATIONS, INC.; COLORADO PROFESSIONAL EDUCATION, INC., doing business as Colorado Bar Refresher, Inc.,	)	
Defendants-Counter-Claimants-Appellees.	)	

ORDER
Entered October 2, 1995

Before ANDERSON, McWILLIAMS, Circuit Judges, and BROWN*, District Judge.

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*Honorable Wesley E. Brown, District Judge, United States District Court for the District of Kansas, sitting by designation.

This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

s/ Audrey F. Weigel

Deputy Clerk

APPENDIX D

PERTINENT PORTIONS OF STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 26. Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue . . . .

No. 95-587

(2)

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

HARCOURT BRACE JOVANOVICH LEGAL AND PROFESSIONAL PUBLICATIONS, INC. AND COLORADO PROFESSIONAL EDUCATION, INC. d/b/a COLORADO BAR REFRESHER, INC.,

Petitioners,

v.

MULTISTATE LEGAL STUDIES, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied the two-product test established in *Jefferson Parish Hospital District No. 2* v. *Hyde*, 466 U.S. 2 (1984), and *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451 (1992), to the unique facts of this case.

2. Whether product improvement as a business justification was properly left open for trial when petitioners did not assert product improvement as an affirmative defense on summary judgment and the product improvement issue would better be resolved on a full record.

3. Whether the court of appeals correctly determined that petitioners were not entitled to summary judgment on the predatory pricing claim against them where they admittedly priced one of their products below any measure of cost.

4. Whether review is appropriate to determine the scope of the duty to cooperate with a competitor in an attempt to monopolize case where the court below did not, and did not need to, resolve that issue.

RULE 29.6 LIST

Respondent Multistate Legal Studies, Inc. has no parent corporation and no subsidiaries.

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STATUTES
The Sherman Act, 15 U.S.C. §§ 1, 2 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-587

HARCOURT BRACE JOVANOVICH LEGAL AND PROFESSIONAL PUBLICATIONS, INC. AND COLORADO PROFESSIONAL EDUCATION, INC. d/b/a COLORADO BAR REFRESHER, INC.,

Petitioners,

v.

MULTISTATE LEGAL STUDIES, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF IN OPPOSITION

Multistate Legal Studies, Inc. (referred to by its trade name "PMBR") hereby opposes the petition for a writ of certiorari filed by Harcourt Brace Jovanovich Legal and Professional Publications, Inc. ("HBJL") and Colorado Professional Education, Inc. d/b/a Colorado Bar Refresher, Inc. ("CBR") (collectively "petitioners").

STATEMENT OF THE CASE

Petitioners are monopolists in the market for full service bar review courses in the State of Colorado. This antitrust case involves their efforts to extend that monopoly to the separate market for supplemental bar review courses. Because petitioners have ignored the evidence which led the court of appeals to conclude properly that

summary judgment in their favor was inappropriate, a brief counter-statement of the case is necessary.

1. As the parties stipulated in the district court, there are two separate product markets related to lawyers' preparation for the Colorado bar exam. C.A. App. 240-43.[1] The first consists of full service bar review courses. These are six to seven week courses designed to prepare students for all four components of the Colorado bar exam: the Multistate Bar Exam ("MBE"), the essay questions, the Performance Test, and the Multistate Professional Responsibility Evaluation. *Id.* at 173-75.

The second, separate market is for supplemental MBE workshops. These are intensive, three-day workshops that provide special preparation directed solely to the MBE portion of the Colorado bar exam. *Id.* Generally, the first day of a supplemental MBE workshop consists of the administration of a simulated MBE, and the other two days are spent reviewing the correct answers. Supplemental MBE workshops are designed to be taken *in addition* to a full service course by students who believe that the critical MBE portion of the bar exam requires special preparation. *Id.* at 354.

Petitioner HBJL is the largest provider of full service bar review courses in the country. Since 1974, HBJL and its licensee CBR have, as they stipulated below, jointly enjoyed a monoply in the Colorado market for full service bar review courses. *Id.* at 240-43; Pet. App. 5a.

In 1977, PMBR pioneered supplemental MBE workshops, which it began offering in Colorado in approximately 1978. C.A. App. 355, ¶ 5. By 1991, PMBR was the most successful supplemental MBE workshop provider in the country. *Id.*

In the early 1980's, petitioners began offering supplemental MBE workshops in Colorado. *Id.* From the out-

[1] Citations to C.A. App. refer to the Appellant's Appendix on appeal to the Tenth Circuit.

set, they marketed these workshops—which they eventually came to call "Gilbert's"—separately from their full service courses. *Id.* Students who wished to take petitioners' supplemental MBE workshop submitted a separate application and paid a separate fee from the full service course. *Id.*

The genesis of this case was PMBR's announcement in 1989 that it intended to offer a full service course in California and, if successful, in such other states as Colorado. CBR's president admitted that petitioners considered PMBR a potential competitor in the Colorado full service bar review market. *Id.* at 447-48; see also Pet. App. 5a. In response to PMBR's announced entry into the full service market, HBJL's chief executive officer, Richard Conviser, made a proposal to PMBR's president, Robert Feinberg, that the companies allocate markets between them. C.A. App. 359. Specifically, Conviser proposed that PMBR not offer full service courses outside California in return for HBJL not offering supplemental MBE courses anywhere. *Id.* Feinberg declined, citing antitrust concerns, which prompted Conviser to threaten "[y]ou'll be sorry." *Id.*[2]

Several months later, as reflected in the minutes of HBJL's annual meeting, Conviser told HBJL's executives that "this is the year to go after PMBR." *Id.* at 379. Petitioners then began taking a number of steps to drive PMBR out of business and to acquire PMBR's share of the supplemental MBE workshop market.

First, although they had *always* offered their full service course and their Gilbert's MBE workshop as separate products, HBJL and CBR began to bundle the two products. For the July 1992 bar exam, HBJL and CBR for

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[2] In *Palmer* v. *BRG, Inc.*, 498 U.S. 46, 49-50 (1990) (per curiam), this Court held that the license agreement between HBJL and its Georgia licensee was " 'formed for the purpose and with the effect of raising' the price of the bar review course" and hence "was unlawful on its face."

the first time offered their full service course and Gilbert's workshop as a two-product package at $795, the price previously charged for the full service course alone. Not surprisingly, all of their full service customers automatically purchased the Gilbert's workshop as well. Petitioners permitted customers to purchase the Gilbert's workshop alone for its established price of $325, but did not permit customers to purchase the full service course without also receiving Gilbert's. Pet. App. 11a.

Second, in conjunction with this new two-product package offering, petitioners began an advertising campaign stating that their full service customers would receive the Gilbert's workshop "for free." C.A. App. 423. Their marketing encouraged students to avoid, or withdraw from, PMBR's supplemental MBE workshops. *Id.* at 364-65, ¶ 40; 351, ¶ 9; 534-35.[3]

Third, petitioners planned from the outset to bundle their full service and supplemental courses in Colorado only on a temporary basis. In September 1992, CBR's president wrote to an HBJL official and "referred to a future time when the Gilbert course would again be offered only for added tuition, as it was before the summer of 1992." Pet. App. 11a-12a; see also C.A. App. 199, 346. Consistent with this intention to unbundle the package offering, petitioners still employ separate national administrators, campus representatives, registration forms and addresses for the two courses. Pet. App. 12a. In addition, HBJL has in several states other than Colorado continued to offer full service and supplemental MBE courses as entirely distinct products. *Id.* at 11a; C.A. App. 325, ¶ 8.

Fourth, in addition to bundling, HBJL and CBR intentionally created schedule conflicts between their full serv-

---

[3] In 1993, HBJL and CBR increased the price of thier full service course from $795 to $845 to recapture some of the added costs of providing Gilbert's as part of the two product package. Pet. App. 11a. Nevertheless, petitioners continued to advertise that Gilbert's was being offered "for free." *Id.* at 32a.

ice courses and PMBR's supplemental MBE workshops, despite having taken "extraordinary steps" to avoid such conflicts in the past. *Id.* at 205, 446. PMBR was informed that such scheduling conflicts would persist until it agreed not to enter into the Colorado full service market. *Id.* at 421, 459-74. As a result, scheduling conflicts became common, not only in Colorado, but nationwide as well. Across the country there was a 900 percent increase in conflicts from 1990 to 1992. *Id.* at 370-71, ¶ 60.

Petitioners' campaign of predation has largely achieved its intended effect.[4] PMBR's share of the Colorado supplemental MBE market declined from 84 percent in 1991 to 22 percent in 1993. Pet. App. 6a. Likewise, enrollments of the other MBE workshop provider in Colorado, APTS, declined by more than 50 percent from 1991 until 1993. C.A. App. 338-39. A potential new supplier of MBE workshops, Reed Law Group, cancelled its 1993 Colorado workshops. *Id.* at 361, ¶ 31.

On the other hand, petitioners' share of the supplemental MBE workshop market grew from 11 percent in 1991 to 76 percent in 1993. Pet. App. 6a. And, due to its losses, PMBR was forced to scrap its plan to expand into the Colorado full service market. *Id.* at 5a. Thus, petitioners' monopoly in the full service market has been preserved.

2. PMBR commenced this action on November 25, 1992. In its complaint, PMBR alleged that since 1992 petitioners have violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by tying the sale of their Gilbert's supplemental workshops in Colorado to their full service courses and by pricing the Gilbert's portion of the two-product package at a predatorially low price. PMBR further alleged that petitioners have attempted and conspired to

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[4] HBJL's chief operating officer has stated that the purpose of packaging the two products together was to "get back" at PMBR. C.A. App. 581, ¶ 2.

monopolize the supplemental MBE market through a series of predatory actions in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. In addition to tying and predatory pricing, these actions include intentionally scheduling their full service courses so that students could not also take PMBR's courses. C.A. App. 11-26.

Following discovery, petitioners moved for summary judgment. Their principal contention was that they had not combined two separate products, but rather had simply improved their full service course offering. From that premise, they argued that they had not engaged in tying, predatory pricing, or any other antitrust violation. *Id.* at 98-139.

The district court granted petitioners summary judgment as to all of PMBR's federal antitrust claims. It ruled that PMBR had not proved an essential element of its claims because, in its view, incorporating a supplemental MBE workshop into a full service course is an "improvement" of the full service course, not the tying together of two separate products. Pet. App. 50a. In its view, the one-product finding was fatal not only to the tying claim, but to PMBR's other claims as well.

3. On appeal, the Tenth Circuit affirmed in-part, reversed in-part, and remanded for trial. Initially, it concluded that the district court had erroneously failed to apply the test established by *Jefferson Parish Hospital District No. 2* v. *Hyde*, 466 U.S. 2 (1984), and *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451 (1992), for determining whether a package sale involves two separate products or a single product with multiple components. Pet. App. 13a-14a. Those cases teach that distinct products exist for purposes of tying where there is " 'sufficient consumer demand so that it is efficient for a firm to provide [one] separate from [the other].' " *Id.* at 14a (quoting *Kodak*, 504 U.S. at 462; *Hyde*, 466 U.S. at 21-22). Applying that test to the

evidence before it, the Tenth Circuit concluded that PMBR had presented sufficient evidence—including evidence that petitioners had sold the two products separately in the past and continued to do so in certain markets—to create a factual dispute as to whether defendants combined two products, or simply improved a single product. *Id.* at 16a.

The court of appeals thus overturned the grant of summary judgment on the tying claim for 1993 to the present, the years in which petitioners forced its full service customers to purchase Gilbert's. *Id.* at 18a. It also overturned summary judgment on the predatory pricing claim for 1992, the year petitioners included Gilbert's in the package for no extra charge, finding that respondent had presented sufficient evidence that petitioners had a "reasonable expectation" of recouping their losses from predatory pricing. *Id.* at 18a-21a.

The court of appeals also reversed summary judgment on respondent's claims that petitioners had attempted and conspired to monopolize the supplemental MBE workshop market, concluding that respondent's evidence concerning tying, predatory pricing, and the creation of intentional schedule conflicts was sufficient to allow a jury to find anticompetitive conduct. *Id.* at 22a-23a, 32a. In this connection, the court of appeals further concluded that the evidence on petitioners' product improvement and other defenses was disputed. The court of appeals reasoned that the evidence showing petitioners' dramatic increase in market share, their superior resources, and the high barriers to entry into the supplemental MBE workshop market was sufficient to preclude summary judgment on the "dangerous probability of success" element. *Id.* at 33a-39a.[5]

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[5] Finally, the court of appeals upheld the district court's grant of summary judgment as to respondent's claim that petitioners monopolized and conspired to monopolize the full service bar review market. This ruling is not challenged before this Court.

REASONS FOR DENYING THE PETITION

Contrary to petitioners' contentions, the Tenth Circuit's decision is not erroneous, does not create a conflict among the circuits, and does not deviate from this Court's earlier decisions. Instead, the court of appeals simply applied this Court's teachings to the evidence presented by the parties and determined that there were disputed facts which precluded the award of summary judgment. This case does not present important or novel legal issues, only factual disputes not calling for this Court's review.

I. THE RULING HERE FAITHFULLY APPLIES THE *HYDE/KODAK* TWO-PRODUCT TEST AND DOES NOT CONFLICT WITH RULINGS FROM ANY OTHER CIRCUIT.

Petitioners argue that the Tenth Circuit's decision "misconstrues" the *Hyde/Kodak* test for determining whether, in a tying case, a package sale involves two separate products or a single product with multiple components, and that it conflicts with rulings from other circuits. Pet. 10-15. In actuality, the Tenth Circuit's decision faithfully applies *Hyde/Kodak* and conflicts with no appellate decision applying that test.

A. The Tenth Circuit Correctly Applied *Hyde/Kodak*.

In *Hyde*, this Court explained "that the answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items." *Hyde*, 466 U.S. at 19. A finding of separate products is appropriate whenever there is sufficient consumer demand that "it is efficient to offer" the two products separately. *Id.* at 21-22. Thus, hospital services and anesthesiological services are two separate products where the hospital had historically billed the two services separately and where patients "often" requested specific anesthesiologists. *Id.* at 22.

In *Kodak*, this Court, reversing the entry of summary judgment, held that there was sufficient evidence from which a jury could find that service and parts were separate products, explaining, "[f]or service and parts to be considered two distinct products, there must be sufficient consumer demand so that it is efficient for a firm to provide service separately from parts." *Kodak*, 504 U.S. at 462 (citation omitted). The record there contained sufficient evidence of such demand because "service and parts have been sold separately in the past and still are sold separately to [certain] owners."

Here, the court of appeals carefully reviewed the record to determine whether a jury reasonably could find there was sufficient separate demand for petitioners to offer their full service and supplemental MBE courses as separate products. Its opinion identifies several sources of evidence from which a jury reasonably could conclude that separate demand exists under the governing *Hyde/Kodak* test, including evidence that:

> 1) Defendants stipulated that full-service courses and supplemental MBE workshops are in separate product markets.
>
> 2) Defendants have marketed their full-service course and their supplemental workshop as separate products, for separate fees, for over a decade and still offer Gilbert separately.
>
> 3) In Kansas, Ohio and Hawaii, HBJL and/or its licensees still offer the full-service course unbundled from Gilbert.
>
> 4) Prior to Defendants' bundling, not every full-service course customer chose to purchase a supplemental workshop; in Colorado, only one-third to one-half did so.
>
> 5) In the past, HBJL officials worked to keep their external Gilbert workshop separate and distinct in customers' minds from the HarBrace workshop within the full-service course, because many cus-

tomers preferred to buy from two different companies to get multiple providers' perspectives on the MBE.

6) Defendants have not consolidated the operation of the full-service and supplemental courses; Gilbert continues to be administered and marketed separately.

7) One or more of Defendants' officers contemplated that the inclusion of the Gilbert workshop in the full-service course at no added charge would be only temporary.

8) Other bar review industry participants view full-service and supplemental MBE courses as separate products.

Pet. App. 15a-16a.

Thus, as in *Kodak*, summary judgment on the two product issue was plainly inappropriate. The two products have been sold separately in the past and still are sold separately to "[certain] owners." The evidence upon which petitioners rely—that their full service course always has had *some* MBE preparation, the parties' stipulation reflecting that fact,[6] and petitioners' view that they simply increased the MBE content of their full service course—at most creates a factual dispute which must be resolved by a jury under the *Hyde/Kodak* test. Moreover, *Kodak* directly refutes the petitioners' contention that there can be only one product because the parties stipulated that a full service course includes MBE preparation. *Kodak* quoted with approval the Court's statement from *Hyde* that "[w]e have often found arrangements

[6] The full text of the relevant stipulations is as follows: "[a] full-service bar review course is designed to prepare students for all components of that jurisdiction's bar examination"; "CBR offers a full-service bar review course in the State of Colorado consisting of a six-week curriculum that prepares students for the Colorado bar examination, including the essay portion of the exam, the MBE, the PT and the MPRE." C.A. App. 174-75, ¶¶ IV.C.1, IV.F.2.

involving functionally linked products at least one of which is useless without the other to be prohibited tying devices." 504 U.S. at 463.

Petitioners assert that review should be granted because the *Hyde/Kodak* test does not apply to "a composite product that *necessarily* includes a component also sold separately." Pet. 11. There are at least two reasons why they are wrong.

First, petitioners' argument assumes its conclusion. That this case involves such a composite product is not "necessarily" so, but is only petitioners' contention, based on their evidence alone. While petitioners contend this case is akin to viewing the butter in cookies as a separate product from the cookies, the facts supporting that characterization are hotly disputed. PMBR's evidence, which petitioners persistently ignore, supports the competing characterization that this case is like a monopolist cookie maker requiring its cookie customers also to purchase a five pound tub of butter, or a monopolist car maker requiring its customers to purchase a car with four tires *plus* twelve spares. In light of the disputed facts, the Tenth Circuit correctly recognized this issue must be resolved by a jury.

Hyde and *Kodak*, moreover, make plain that the separate demand test applies universally to all tying cases. In *Hyde,* anesthesiology and other hospital services were found to be separate products, even though anesthesiology is a necessary component of surgery. And *Kodak* expressly rejected an argument that "parts and service [of photocopiers] are not separate products for tying purposes because all service may involve installation of parts." 504 U.S. at 463 n.7. The *Kodak* Court explained:

> that there can never be separate markets, for example, for cameras and film, computers and software, or automobiles and tires . . . is an assumption we are unwilling to make.

Id. at 463. Whether such separate markets exist in a particular case, *Kodak* emphasized, is a factual question that cannot be resolved on summary judgment where, as here, the relevant facts are disputed. *Id.* at 463 n.7.

B. The Decision Here Does Not Create A Circuit Conflict.

Petitioners' subsidiary contention that the Tenth Circuit's decision "conflicts with a majority of the circuits" is without substance. They cite three cases decided after *Hyde* but before *Kodak*. Pet. 10 (citing *Jack Walters & Sons Corp.* v. *Morton Bldg., Inc.*, 737 F.2d 698 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984); *Montgomery County Ass'n of Realtors, Inc.* v. *Realty Photo Master Corp.*, 1993-1 Trade Cas. (CCH) ¶ 70,239 (4th Cir.) (unpublished), *cert. denied*, 114 S. Ct. 440 (1993); *Souza* v. *Estate of Bishop*, 821 F.2d 1332 (9th Cir. 1987)). But none of these cases conflicts with the present one.

Petitioners stress *Jack Walters* most vigorously, but the only question presented there was whether a physical product and its associated trademark are separate products. 737 F.2d at 704-05. Applying the *Hyde* separate-markets test to the undisputed record before it, the court, through Judge Posner, unremarkably concluded that there were not separate products. *Id.* at 704 ("the separate-markets test of [*Hyde*] is not satisfied"). The panel also emphasized that the multiple product question cannot be "decided on summary judgment . . . if there is any material fact in dispute." *Id.* at 705.

The portion of the *Jack Walters* opinion on which petitioners rely here was, as Judge Posner acknowledged, *dicta*.[7] Before deciding the narrow question before the court, the panel questioned the economic wisdom of the

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[7] *Jack Walters*, 737 F.2d at 704. Judge Swygert wrote a separate concurrence criticizing the majority for writing such extensive *dicta*. *Id.* at 713-14.

Hyde separate-markets test. In particular, the panel expressed concern that, under *Hyde*, sales of belts could be viewed as tie-ins of buckles and straps, or sugary cereal as tie-ins of sugar and cereal. *Id.* at 704. The panel majority viewed these results as "problematic." *Id.*

The *dicta* from *Jack Walters* constitutes no more than a scholarly criticism of the Hyde separate-markets test, not a conflict with the ruling here. In any event, any doubts as to the validity of the *Hyde* test were laid to rest when this Court revisited the separate product question in *Kodak*. Rather than retreating from the *Hyde* test, *Kodak* reaffirmed it, holding squarely that there are "two distinct products" if there is "sufficient consumer demand so that it is efficient for a firm to provide [them] separately . . . ." 504 U.S. at 462.

The unpublished opinion in *Montgomery County* likewise creates no conflict.[8] There, plaintiffs unsuccessfully sought to enjoin as a tie-in the sale of multiple list real estate information coupled with pictures of the properties. 1993-1 Trade Cas. (CCH) ¶ 70,239, at 70,179-80. Applying *Hyde* in a straightforward manner, the Fourth Circuit concluded there was not sufficient separate demand to make it efficient to sell the two items independently. See *id.* at 70,181 (whether two separate products exist " 'turns not on the functional relation between the two allegedly separate products, but rather on the character of the demand for the two items' ") (citing *Hyde*, 466 U.S. at 19).[9]

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[8] Of course, a conflict with an unpublished decision would not merit this Court's plenary review. As Fourth Circuit Rules 36.5 and 36.6 make clear, citations to unpublished decisions are "disfavored" because they "may not recite all of the facts or background of the case and may simply adopt the reasoning of the lower court."

[9] Likewise, the Ninth Circuit in *Souza* applied *Hyde* in straightforward fashion, holding that "the plaintiffs presented no evidence from which a reasonable juror could find that the house and lease constituted separate products." 821 F.2d at 1336.

In sum, the court of appeals' decision faithfully applied the governing *Hyde/Kodak* test, and creates no conflict among the circuits.

II. THIS CASE DOES NOT PRESENT AN APPROPRIATE VEHICLE FOR RESOLVING WHETHER THE BUSINESS JUSTIFICATION OF PRODUCT IMPROVEMENT SHOULD BE RECOGNIZED AS AN AFFIRMATIVE DEFENSE TO A SECTION 1 TYING CLAIM.

Petitioners argue that this Court should grant review to determine whether the business justification of product improvement should be recognized as an affirmative defense to a Section 1 tying claim. Pet. 16. It would be inappropriate, however, to consider that issue at this stage of this case. First, the issue is not in fact presented here. Second, consideration of this issue now would not, regardless of the outcome, eliminate the need to remand for trial. Third, trial could well make the Court's resolution of the issue unnecessary. Finally, the Tenth Circuit's decision creates no circuit conflict.

A. The Propriety Of A Product Improvement Affirmative Defense Was Neither Litigated Nor Resolved Below.

Petitioners now argue the product improvement issue in a fundamentally different way and for a fundamentally different purpose than they did below. Their position below was that they had not combined two separate products, but rather had simply improved a single product. Br. of Appellee 19.[10] From this premise (which the

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[10] In the pre-trial order, petitioners explained that their legal theory was as follows:

> "An essential ingredient of PMBR's tying and predatory pricing claims is that CBR is selling two products . . .
>
> The two product theory is incorrect. Full-service courses are a single product . . . . CBR's full-service course has included

Tenth Circuit correctly held was disputed), they argued that they had not engaged in tying at all.

Petitioners, in other words, argued product improvement to rebut an element of respondent's *per se* claim—the two product element—not, as they now suggest they did (Pet. 16), to prove an affirmative defense to *per se* liability. Petitioners failed to put into issue and prove such an affirmative defense. They did not identify the elements of any such affirmative defense, argue why such a defense should be recognized as to a *per se* Section 1 violation, cite any of the cases or authorities they now argue support the validity of such a defense (see Pet. 17-20), or demonstrate that there was no factual dispute as to any of the elements of their affirmative defense.

The Tenth Circuit likewise did not understand petitioners to argue they were entitled to summary judgment based on an affirmative defense. To the contrary, that court said petitioner's argument was "that their actions involved nothing more than the improvement of a single product, their full-service course." The court described in detail why the evidence as to whether there were one or two products was in dispute (Pet. App. 13a-16a), but did not discuss in detail whether, or under what circumstances, there might be a business justification defense to a Section 1 tying claim (Pet. App. 25a n.9).

Thus, the question whether product improvement should be recognized as an affirmative defense to a Section 1 tying claim (or whether the *per se* standard should be relaxed to permit this) was neither litigated in, nor re-

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substantial MBE preparation since the introduction of the MBE in 1972. All significant full-service courses today, including CBR, have improved their products by emphasizing MBE practice examinations in a workshop setting. PMBR cannot divide the full-service course into two separate products just to preserve market niche."

C.A. App. 165-66.

solved by, the court of appeals. Petitioners have thus waived their right to pursue that issue in this Court at this juncture of the case.

B. A Ruling At This Time Would Be Unnecessary.

Even if this issue were properly before the Court, there is ample reason why the Court should not review it at this time. Although no case has recognized a product improvement defense where the threshold requirements of *per se* liability have been established under Section 1, a product improvement defense to a Section 2 violation requires evidence that petitioners were motivated by a desire to improve their product and, in fact, acted on that desire. See Pet. App. 25a-26a.[11] In reviewing PMBR's Section 2 claims, the Tenth Circuit held, however, that there were legitimate factual disputes as to each of these issues that could be resolved only by a jury.

To illustrate, as to the motivation for the change, the Tenth Circuit noted that "PMBR has offered evidence that the bundling was a response to PMBR's refusal to take part in a proposed market allocation agreement, that Defendant's executives never have believed that bar applicants need Gilbert to pass the bar; [and] that Defendants intended the bundling to be only temporary." *Id.* at 27a (internal citations omitted).[12] And, as to the effect of the change, the court observed that bar applicants de-

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[11] The cases cited by petitioners which have recognized a "good will" business justification defense against tying under Section 1 also have required proof that the actual effect of the tie was pro-competitive, and that no lesser restrictions were available to the tying defendant. The facts as to those issues are disputed as well. *See* Part II.C., *infra*.

[12] Moreover, PMBR presented evidence that bundling was not a response to competition in the Colorado full service market, in that petitioners did not consider their only competitor in that market, SMH Bar Review, a serious threat. C.A. App. 203-04, 362, ¶ 34.

scribed "the 'free' Gilbert sessions as 'horrible,' 'a waste of time,' 'awful' and 'a joke,' " and that the pass rate of petitioners' students declined after they packaged the two products together. *Id.* at 28a-29a.

The Tenth Circuit also found that the record contains ample evidence that petitioners' tie has had an anti-competitive effect, consistent with their intent to "get back" at PMBR. Since the tie was initiated, PMBR's share of the supplemental MBE market has declined from 84 percent to 23 percent, while petitioners' share has increased from 11 percent to 76 percent. *Id.* at 6a. Other competitors in the supplemental MBE workshop market also have suffered losses since petitioners began their bundling. C.A. App. 338-39, 361, ¶ 31.

There is, therefore, no reason why the Court should consider the product improvement affirmative defense question at this time. Because the relevant material facts are disputed, it would be necessary to remand this case for trial even if the Court were to conclude that such a defense should be recognized in Section 1 cases. Moreover, petitioners may well be unable to convince the jury that their defense is meritorious, or may, to the contrary, convince the jury that they are entitled to judgment on some other point altogether. In either event, the Court's consideration of this issue at this stage would prove to have been unnecessary. In sum, the product improvement defense is a factual issue that requires resolution by a jury and is not ripe for consideration by the Court at this time.

Petitioners' related argument—that the Tenth Circuit's decision "effectively nullifies product improvement as a viable defense" to a Section 2 claim (Pet. 24)—is sheer hyperbole, without any analytical content. The Tenth Circuit simply held, correctly, that the relevant facts are disputed. See Pet. App. 25a-29a.

C. The Ruling Here Does Not Create A Circuit Conflict.

Contrary to petitioners' suggestion, the ruling here does not create a circuit conflict as to the availability of a business justification affirmative defense in Section 1 tying cases. Nor could it since that issue was neither litigated nor resolved below.

Petitioners nonetheless claim *Virtual Maintenance, Inc.* v. *Prime Computer, Inc.*, 957 F.2d 1318, 1323 (6th Cir)., *vacated*, 113 S. Ct. 314 (1992), conflicts with the decision here by recognizing a business justification affirmative defense. However, *Virtual Maintenance* was decided before *Kodak*, and was vacated and remanded by this Court for reconsideration in light of that decision. *Virtual Maintenance, Inc.* v. *Prime Computer, Inc.*, 113 S. Ct. 314 (1992). On remand, the Sixth Circuit applied the test for *per se* illegality originally enunciated in *Hyde* to conclude that a *per se* illegal tie-in had been established, even though, under the rule of reason, the defendant's conduct would not have been prohibited. *Virtual Maintenance, Inc.* v. *Prime Computer, Inc.*, 11 F.3d 660, 663-67 (6th Cir. 1993).

Petitioners also claim *Metrix Warehouse, Inc.* v. *Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033, 1042 & n.17 (4th Cir. 1987), *cert. denied*, 486 U.S. 1017 (1988), and *Mozart Co.* v. *Mercedes-Benz, Inc.*, 833 F.2d 1342, 1348 (9th Cir. 1987), *cert. denied*, 488 U.S. 870 (1988) conflict with the decision here. But again, both of those cases expressly acknowledged that the *per se* rule applies to tying arrangements where the threshold criteria have been met. *Metrix*, 828 F.2d at 1038 n.9; *Mozart*, 833 F.2d at 1345.

Moreover, those cases involved a very different issue than the one petitioners seek to litigate here. At issue in *Metrix* and *Mozart* was the "good will" defense, which the Court addressed many years ago in *Standard Oil Co.* v. *United States*, 337 U.S. 293, 305-06 (1949):

> Tying agreements serve hardly any purpose beyond the suppression of competition. The justification most often advanced in their defense—the protection of the good will of the manufacturer of the tying device—fails in the usual situation because specification of the type and quality of the product to be used in connection with the tying device is protection enough. If the manufacturer's brand of the tied product is in fact superior to that of competitors, the buyer will presumably choose it anyway. The *only* situation, indeed, in which the protection of good will may *necessitate* the use of tying clauses is where specifications for a substitute would be so detailed that they could not practicably be supplied.

Id. (emphasis added) (cited in *Metrix*, 828 F.2d at 1040 & n.12). Applying this standard, the Fourth Circuit in *Metrix*, and the Ninth Circuit in *Mozart*, upheld the determinations of two different juries, based upon different evidentiary facts, as to whether a "good will" defense had been established. *Metrix*, 828 F.2d at 1041-42; *Mozart*, 833 F.2d at 1348.

This case, unlike *Metrix* and *Mozart*, does not involve a "good will" defense. Petitioners did not assert such a defense in the courts below. They did not cite or rely upon *Metrix* or *Mozart*. And they did not show, as both *Metrix* and *Mozart* mandate, that the tie "was established for a legitimate purpose and [that] no less restrictive alternative is available." See *Mozart*, 833 F.2d at 1348. To the contrary, the record shows that the tie was established to "get back" at PMBR and that it impaired, not enhanced, petitioners' good will. C.A. App. 25a-29a. For each of these reasons, review is not appropriate as to this issue either.[13]

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[13] Although petitioners also cite *Grappone, Inc.* v. *Subaru*, 858 F.2d 792, 799 (1st Cir. 1988), and *Kenworth, Inc.* v. *Paccar Financial Corp.*, 735 F.2d 622, 624 (1st Cir. 1984) (Pet. 19-20), they quite properly refrain from arguing that either decision conflicts with the ruling here.

Finally, review is not required to consider whether the rule of *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447 (1993)—that a Section 2 attempted monopolization claim is actionable only when there is proof of dangerous probability of success—should be extended to require proof of dangerous probability of monopolization of the tied product market for Section 1 tying claims. Pet. 20. Consideration of that issue could not conceivably affect the outcome of this case. As the Tenth Circuit found, the record contained sufficient evidence that there was a "dangerous probability" that petitioners could monopolize the supplemental MBE workshop market, including evidence that they had increased their share of that market from 11 percent in 1991 to 76 percent in 1993 as a result of their tying, pricing and schedule conflicting practices. Pet. App. 6a, 39a-40a. This clearly creates a question of fact as to "dangerous probability."

III. THE TENTH CIRCUIT DID NOT EXPAND THE LAW OF PREDATORY PRICING.

HBJL and CBR assert that the Tenth Circuit's decision conflicts with *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993). Pet. 25-27. That assertion is demonstrably incorrect.

Petitioners complain that the Tenth Circuit overlooked the fact that the 1992 tuition exceeded the cost of the package. Pet. 26. But once again petitioners improperly assume resolution in their favor of the disputed two product issue. Respondent conceded below that there was no predatory pricing if petitioners simply improved a single product. But the converse is also true. There would be a violation if, as respondent contends, petitioners tied two separate products together, a proposition which petitioners ignored below, but did not dispute. Pet. App. 20a n.7. Because the two product issue is legitimately disputed, and because petitioners charged nothing for Gilbert's in 1992,

the Tenth Circuit correctly held they were not entitled to summary judgment on this issue.

Petitioners also argue the Tenth Circuit ignored this Court's admonition in *Brooke Group* that "predatory pricing schemes are rarely tried, and even more rarely successful." Pet. 26. What petitioners ignore is the evidence presented by PMBR, and discussed by the Tenth Circuit, that the predatory pricing scheme here made sense "in order to discipline PMBR for refusing to allocate markets and to deprive PMBR of the resources necessary to continue its full-service market incursions." Pet. App. 19a n.6. Moreover, as evidenced by petitioners' 76 percent market share in the supplemental MBE workshop (*id.* 6a) their predatory scheme enabled them to expand their monopoly in the full service market to encompass the supplemental MBE workshop market as well, the precise result condemned by *Brooke Group*.

IV. THIS CASE DOES NOT INVOLVE AN *ASPEN SKIING* ISSUE.

Petitioners' final argument is that the Tenth Circuit improperly imposed potential liability on them "for refusal to cooperate with a rival," contrary to *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). Pet. 27. This is a flat misstatement of the Tenth Circuit's holding. The Tenth Circuit took pains to point out that the *Aspen Skiing* "principles governing refusals to deal do not control here." Pet. App. 31a n.12. Rather than impose a duty to cooperate with a rival, the Tenth Circuit reversed summary judgment because it found there was sufficient evidence that the defendants created "deliberate" schedule conflicts as part of "pattern . . . capable of contributing significantly to a monopolization attempt." Pet. App. 30a, 32a. Petitioners cannot and do not argue that the Tenth Circuit's actual holding on those facts merits review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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(3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HARCOURT BRACE JOVANOVICH LEGAL AND PROFESSIONAL PUBLICATIONS, INC. AND COLORADO PROFESSIONAL EDUCATION, INC. D/B/A COLORADO BAR REFRESHER, INC.,

Petitioners,

vs.

MULTISTATE LEGAL STUDIES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INTRODUCTION

PMBR's opposition to the petition for writ of certiorari seeks to distract the Court by fabricating irrelevant factual disputes[1] but only serves to highlight the flaws in the Tenth Circuit's decision. The Tenth Circuit's decision treats composite products as tying arrangements subject to the per se rule of illegality, even though it is stipulated that consumers demand that the composite product include a component, also available separately. It creates a split among the circuits as to the availability of a business justification defense under the "per se" tying rule. In concluding that BAR/BRI's MBE training was sold below cost, it ignores the facts and the law and opens many valid business practices to antitrust challenge. Lastly, it creates an unprecedented and factually unsupported duty to cooperate with competitors. Each of these dispositive legal issues is fully presented on the record below and will not be further clarified by additional proceedings.

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[1] Knowing that the Court does not have the benefit of the record below, PMBR repeatedly engages in distortion and misstatement. Two examples will suffice. On page 5 of its brief, PMBR states, first, that it was "informed that such scheduling conflicts would persist until it agreed not to enter into the Colorado full service market" and, second, that there was a "900 percent increase in conflicts from 1990 to 1992." Neither statement is even remotely supported by PMBR's citations, which are attached hereto in the appendix ("App.") at 1a-19a.

PMBR also makes several inflammatory but irrelevant and incorrect factual statements. For example, PMBR reaches the remarkable conclusion that BAR/BRI had 76 percent of the supplemental market in 1993 by including enrollees in BAR/BRI's full-service course in the supplemental calculations. (Opp. at 5) PMBR ignores that it held a virtual monopoly in the stipulated supplemental MBE market in 1991. (Baseman Aff. Ex. 3)

I. THE TENTH CIRCUIT MISCONSTRUED THE TWO PRODUCT TEST

PMBR claims that tying occurs if separate demand exists for a component of a product, even if there is no demand for the composite product without inclusion of the component. The cases of *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984), and *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), do not address this issue; instead, they simply rule out an extreme view of the two products inquiry -- that two products can be treated as one for antitrust purposes whenever they are functionally related.

Unlike the facts in *Kodak* and *Jefferson Parish*, PMBR stipulated that full-service bar review courses necessarily comprise a combination of training for all aspects of the Colorado bar examination. Thus, PMBR effectively concedes that consumers *demand* preparation for the MBE as part of a full-service bar review course. Indeed, PMBR admits that one-half to two-thirds of all Colorado full-service customers take no other MBE preparatory course. (Opp. at 9, point 4) It is also undisputed that all other full-service bar review providers include full MBE preparation in their full-service curricula at no additional cost. Finally, it is undisputed that, in 1992, BAR/BRI added an extra day of MBE training in response to competitors' advertising claiming that its MBE preparation was inadequate.[2]

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[2] (Davis Aff. ¶¶ 25-30) PMBR claimed that, by charging students extra for Gilbert, BAR/BRI was admitting that its full-service course contained inadequate MBE preparation. (Conviser Aff. ¶¶ 32, 37 & Exs. 8, 14) SMH and Barpassers attacked BAR/BRI for charging students "extra" for what it claimed was included in SMH's course for "free." (Conviser Aff. ¶¶ 33, 35 & Exs. 3, 9-11)

PMBR's stipulation, therefore, satisfies the requirement in *Jefferson Parish*, 466 U.S. at 19, and *Kodak*, 504 U.S. at 462, that the existence of two products turns on the character of *demand* for them, rather than on their functional relationship. PMBR correctly observes that *Jefferson Parish* treated as tie-ins the sale of two functionally linked products, one of which was useless without the other. (Opp. at 10-11) However, the case at bar deals with a different issue; here there is no demand for the tying product without inclusion of the allegedly tied product. Thus, although functionally related, guns and bullets are separate products, while guns and gun stocks are not. Similarly, cookies with butter are a single product; adding extra butter does not change the result.[3] As stipulated by PMBR, MBE training is part of the single product known as a full-service bar review course.

All the evidence cited by PMBR, such as the eight factors cited on pages 9 and 10 of its brief, is irrelevant to the issue presented to the Court for review because it merely shows that there is a market for supplemental workshops, a fact to which BAR/BRI stipulated. As to the merits of the issues raised in the petition, PMBR's only response is that:

> The evidence on which Petitioners rely -- that their full service course always has had *some* MBE preparation, the parties' stipulation reflecting that fact, and petitioners' view that they simply increased the MBE content of their full service course -- at most creates a factual dispute which must be resolved by a jury under the *Hyde/Kodak* test.

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[3] While there is a separate market for tires, the fact that no one is interested in buying a car that lacks tires means that autos equipped with tires do not amount to a tie. Improving the car's performance by equipping it with radial tires would not result in a tie, although forcing the purchaser to buy eight extra spares probably would.

(Opp. at 10 (footnote omitted)) This claim is plainly wrong. There is *no* dispute in this record that (a) BAR/BRI's course has always included some level of MBE preparation, (b) it was *stipulated* that full-service courses by definition include MBE preparation and (c) BAR/BRI added more MBE preparation to its full-service course.

PMBR does not dispute that BAR/BRI, time and again, expanded the MBE component of its full-service course. Yet it was only when BAR/BRI added MBE training in 1992 in response to the constant barrage of competitive claims that the MBE portion of its full-service course was inadequate that PMBR pulled the antitrust trigger. PMBR's claims are based on the fact that when it added training in 1992, BAR/BRI re-named the enhanced portion of its course "Gilbert" without imposing a separate charge. The Tenth Circuit's implicit conclusion that BAR/BRI can improve its MBE preparation so long as it does not call it "Gilbert" makes no sense.

The anticompetitive threat inherent in the approach taken by the Tenth Circuit has been recognized by all other circuits that have addressed the issue. For example, PMBR attempts to dismiss *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984), on the grounds that the Seventh Circuit "unremarkably" concluded that a product and its associated trademark are not separate products. (Opp. at 12) The Seventh Circuit's reasoning, however, makes it clear that components of a single composite product cannot be tied. *Jack Walters*, 737 F.2d at 703-04.

Similarly, PMBR ignores the fact that, in each of the other composite product cases cited by BAR/BRI, circuit courts other than the Tenth Circuit held there to be no tie-in despite the fact that the alleged tied component product recently had been, could have been or currently was being

sold separately from the alleged tying composite product. *See Montgomery County Ass'n of Realtors, Inc. v. Realty Photo Master Corp.*, 1993-1 Trade Cas. (CCH) ¶ 70,239 (4th Cir.) (photographs of real estate that recently had been sold separately were packaged with real estate listings), *cert. denied*, 114 S. Ct. 440 (1993); *Souza v. Estate of Bishop*, 594 F. Supp. 1480 (D. Haw. 1984) (houses that were or could have been sold separately were packaged with lease of land), *aff'd*, 821 F.2d 1332 (9th Cir. 1987); *Sobrato v. Prudential Ins. Co. of Am.*, 632 F.2d 786 (9th Cir. 1980) (improvements that could be sold separately were packaged with commercial site).

PMBR's treatment of the *Kodak* decision is also flawed. There, as in *Jefferson Parish*, the Court had no occasion to engage in a substantive review of the limits of the separate demand test with regard to an essential component of a composite product. In neither *Kodak* nor *Jefferson Parish* did this Court even suggest that tying occurs in the absence of any evidence that consumers demand the composite product apart from the essential component.

In sum, the Tenth Circuit's ruling means that all dominant sellers of single products with composite elements are engaged in tying arrangements and possibly subject to per se liability. The record below is more than adequate for the Court to address and reject this unsound and anticompetitive ruling.

II. THE TENTH CIRCUIT IMPROPERLY REJECTED THE PRODUCT IMPROVEMENT DEFENSE

PMBR's arguments regarding the business justification defense are fallacious and misleading. First, it is clear from the record that BAR/BRI has always claimed that product

improvement constituted a legitimate business justification.[4] Indeed, this very issue was briefed at length before the Tenth Circuit, where PMBR argued that case law did not support "[BAR/BRI]'s broad claim that 'product improvement' constitutes an *affirmative* defense to a per se tying violation." (Appellants' Reply Br. at 9 (emphasis added); *see also* Appellants' Opening Br. at 25-29 (section entitled "Product Improvement Is Not A Defense To PMBR's Tying Claim"); Appellee's Br. at 14-19)

Second, the issue is ripe for review because the Tenth Circuit rejected BAR/BRI's argument that there is a product improvement business justification defense to the per se rule under Section 1 of the Sherman Act. *See Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publications, Inc.*, 63 F.3d 1540, 1551 n.9 (10th Cir. 1995). Unless addressed and reversed by the Court, BAR/BRI may be prevented from making this argument at trial.

Third, the Tenth Circuit's rejection of the defense creates a conflict among the circuits as to the availability of a business justification defense to a tying claim. PMBR blatantly misreads *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 11 F.3d 660 (6th Cir. 1993), in which the court reconsidered in light of *Kodak* a prior decision rejecting the existence of aftermarkets. *Id.* at 664-67. In remanding the case to the district court for a trial under the per se rule, the Sixth Circuit reaffirmed all other aspects of its previous decision, including the business justification defense under the per se rule. *Id.* at 667; *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 957 F.2d 1318, 1323 (6th Cir.), *vacated on other grounds*, 113 S. Ct. 314 (1992).

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[4] BAR/BRI's eleventh affirmative defense in its answer asserts that its "conduct advanced efficiency and consumer welfare and was justified by legitimate business reasons." (Answer ¶ 78)

PMBR also asserts that other circuits have identified only a "good will" defense. *See, e.g., Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033, 1040-42 & n.17 (4th Cir. 1987); *Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342, 1348-50 (9th Cir. 1987), *cert. denied*, 488 U.S. 870 (1988). The claim that maintaining good will requires the use of certain spare parts and the claim that changes in a product are needed improvements are simply variations of the business justification defense, which has now been rejected out of hand by the Tenth Circuit. Like the good will defense, product improvement should be treated as a legitimate business justification for an otherwise unlawful tie because it is procompetitive. *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶¶ 738.1, 738.4 (Supp. 1995).

Finally, issues such as the product improvement defense, among others, underscore the need to revisit the per se rule against tying arrangements.

III. THE TENTH CIRCUIT'S PREDATORY PRICING HOLDING IGNORES UNDISPUTED COMMERCIAL REALITIES AND CONTRARY PRECEDENT

PMBR's predatory pricing argument again elevates form over substance. The Tenth Circuit erroneously allocated a price of zero to the Gilbert MBE training portion of BAR/BRI's summer 1992 course. Obviously, no student obtained Gilbert for nothing. To the contrary, the only way to receive the Gilbert MBE training portion was to pay $795 or purchase it separately for $325. Either price admittedly exceeds any relevant measure of cost. PMBR offers no response to these hard facts.

The Tenth Circuit also ignored contrary precedent in other circuits, which have unqualifiedly acknowledged this

reality in analogous circumstances. In *Directory Sales Management Corp. v. Ohio Bell Telephone Co.*, 833 F.2d 606 (6th Cir. 1987), a telephone company gave a first yellow pages listing away for "free" to business customers subscribing to telephone service. The Sixth Circuit found that to demonstrate predatory pricing, the plaintiff would have to show that "overall charges for advertising space in their yellow pages are priced below cost." *Id.* at 614. Similarly, in *Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc.*, 601 F.2d 48 (2d Cir. 1979), a newspaper began offering "free" Sunday editions to six-day subscribers. The Second Circuit ruled that losses would have to be assessed for the "operations taken as a whole." *Id.* at 55.

This issue, like the "composite product" and "product improvement" issues, is ripe for review because the record now contains all the relevant evidence needed for full consideration by the Court.

IV. THE TENTH CIRCUIT BROADLY EXPANDED A MONOPOLIST'S DUTY TO COOPERATE WITH RIVALS AND IGNORED THE SIGNIFICANCE OF UNDISPUTED FACTS

PMBR's assertion that this case does not implicate *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), ignores the import of the ruling below. Under the Supreme Court's decisions, the *only* circumstance in which a monopolist has a duty to cooperate with a rival is when it controls an "essential facility" or has a long history of

cooperation.[5] The Tenth Circuit's decision would remove these limitations without providing any guidelines or parameters.

PMBR's inflammatory allegations regarding BAR/BRI's intent cannot be the basis for this duty. As the Court recently observed:

> Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or "purport to afford remedies for all torts committed by or against persons engaged in interstate commerce."

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578, 2589 (1993) (citation omitted). *See also Spectrum Sports, Inc. v. McQuillan*, 113 S. Ct. 884, 891-92 (1992). Thus, all of the issues of fact asserted by PMBR as evidencing BAR/BRI's desire to defeat PMBR in the marketplace are without legal significance.

Finally, this broad new duty is premised on conduct for which there is no evidence of competitive harm to PMBR. BAR/BRI and PMBR both offer courses within the city limits of Denver (Davis Aff. ¶¶ 37-8 & Ex. 19; Feinberg Aff. ¶ 47; Pretrial Order ¶¶ IV.F.1., IV.F.2.); PMBR courses end at 4 p.m. and BAR/BRI courses do not start until 6 p.m. (Davis Aff. ¶ 37; Cert. Pet. App. 49a). These facts certainly do not create a sufficient predicate for a duty to cooperate with a competitor.

Thus, the record is well-suited for review because no evidence has been produced that could support a finding of objectively anticompetitive conduct.

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[5] *See, e.g., id.* at 600-01, 603-05; *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Lorain Journal Co. v. United States*, 342 U.S. 143, 152-53, 155 (1951).

CONCLUSION

For the reasons set forth above and in the petition, a writ of certiorari should issue.

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APPENDIX

APPENDIX*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

MULTISTATE LEGAL STUDIES, INC., a Delaware corporation,	)	
Plaintiff,	)	
-vs-	)	Civil Action
	)	No. 92-Z-2330
HARCOURT BRACE JOVANOVICH LEGAL AND PROFESSIONAL PUBLICATIONS, INC. and COLORADO PROFESSIONAL EDUCATION, INC. d/b/a COLORADO BAR REFRESHER, INC.,	)	
Defendants.	)	
- -	)	

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* Page 421 of PMBR's appendix on appeal to the Tenth Circuit is an illegible photocopy of a handwritten note by Stephen P. Davis. Because the exact text of this note is recited within the portion of Mr. Davis' deposition cited by PMBR and reproduced herein, *see infra* pp. 3a-4a, the note itself has not been reproduced.

DEPOSITION OF
STEPHEN P. DAVIS
Thursday, April 15, 1993
8:40 a.m.

. . . .

MR. FABRIKANT: Let me have marked as No. 17 --

(Exhibit 17 marked.)

MR. FABRIKANT: -- a document that bears the number CBR 2416.

Q (BY MR. FABRIKANT) Sir, can you identify this document?

A Yeah, this is an internal memorandum or reminder that I wrote for my personal use in remembering a conversation with Russ Granger.

Q Okay. Who -- is this your handwriting?

A Yes, it is.

Q And does this reflect a telephone call with Mr. Granger?

A It reflects -- yeah, a callback or a return of his call.

Q And this was a discussion you had with him on January 16th of 1992?

A Yes.

Q Now, at the time, did you know who Mr. Granger was?

A Yes, I had met Mr. Granger.

Q And who is he?

A He was a person who was staffing a sales table for PMBR at the University of Denver Law School.

Q Okay. Can you read into the record the entirety of your handwritten note?

A At the top of the page is a standard form phone message returned, which recites my initials. It says "From Russell Granger"; the date, 1-16-92; the time 9:48 a.m.; his phone number for me to return the call of 988-5297. And my notation in the message area, called back, to indicate that I did return the call.

The initials are those of my secretary on the memo. My note attached to that phone memo reads: He wanted permission to put brochures inside my class at DU. I said that, at least for this course, 'no'.

I pointed out my long-term concern with their possible expansion of full review into Colorado

and therefore I shouldn't help in any way with their goodwill and name recognition here.

I said that without their full bar as a future threat, there had always been some room for cooperation, i.e., schedule coordination and literature availability.

He was to check with Bob Feinberg for a feel as to imminence of expansion here, and if it looked clear in the foreseeable future, we would discuss further with eye to summer '92 at earliest.

We both acknowledged that there could be no agreement by them as to expansion here due to possible antitrust implications.

Concluded with my initials.

Q Okay. All right. Does this accurately set forth the substance of your telephone discussion with Mr. Granger?

A Certainly not the entirety of it, but the points that I thought I might need a record of.

Q And why might you think you need a record of those points?

A Because some discussion was included in there of cooperating with a competitor, and I would want to be certain that I could document that in those discussions we carefully approached any such effort of cooperation with

PMBR and avoided -- or at least attempted to avoid any antitrust violations in arriving at any cooperative operation.

Q What was the source of your antitrust concerns at that point in time, if any -- strike that.

Did you have an antitrust concern in talking with Mr. Granger?

A I was concerned if any direct cooperative effort between myself and a competitor would be an antitrust problem.

Q What was the source of your understanding in that regard?

A A general understanding that competitors should not coop[illegible]e and make agreements between themselves, and some prior threats from an SMH administrator that antitrust litigation could be filed against us if we entered into cooperative arrangements with PMBR.

Q And when was that statement made to you?

A That statement related back to somewhere in the mid 1980's.

Q And who at SMH made that statement to you?

A A James Branch.

Q And what was the occasion for him making such a statement to you?

A Well, at that point in time, I was only an assistant, so it was not directly to me. I was only third-party to the conversations between him and Mr. Kopel.

Q Uh-huh. And what did -- what was the occasion for that discussion between Mr. Branch and Mr. Kopel?

A I'm not sure exactly what the contemplated cooperation between Kopel and PMBR might have been or what exactly raised Mr. Branch's concerns. Mr. Branch enjoyed threatening litigation, and this was one of several occasions where he did so.

Q Did the Palmer decision from the Supreme Court have anything to do with your noting here antitrust as a potential issue?

A Certainly, by January of '92 I was aware of its existence, and it did nothing to reduce my concerns.

Q Did it enhance your concerns?

A I don't know that it -- it made them more present, but I don't know that it increased or decreased them.

Q All right. Now, you say here that, I pointed out my long-term concern with their possible

expansion of full review into Colorado. What did you mean by that?

A At that point in time, I was aware that PMBR was offering full-service bar review for more than one jurisdiction and expanding into additional jurisdictions; one of those expansion markets being potentially Colorado.

Q Then it says, And therefore, I shouldn't help in any way with their goodwill and name recognition here. Now, were you concerned about the possibility -- in January of '92 -- that PMBR might begin offering a full-service course in Colorado?

A Yes, I was.

Q Why were you concerned about it?

A Because they were expanding into other states, and there was no reason to believe that they would not expand here. And it would be very easy for them to do so. It seemed to be the prudent business position to take.

Q Why would you consider it easy for them to expand into Colorado?

A Once they had developed a course which they considered transportable into other jurisdictions, it's easy to take a full-service course into any state in the United States with very few exceptions.

Q And what would those exceptions be?

A Louisiana.

Q Anything else?

A Washington State.

Q Why Washington State?

A Because Washington State does not utilize the Multistate Bar Examination.

Q Uh-huh.

A Iowa for the same reason. It does not utilize the Multistate Bar Examination.

Q Uh-huh.

A Indiana for the same reason, that it does not utilize the Multistate Bar Examination. West Virginia for the reason that it tests a lot of localized law. Most states, and certainly Colorado, it would be easy to take and modify and transport their course from California into Colorado.

Q Why did you think it would be easy for them to do that?

A Because they would have all the components necessary to do so.

Q Would it have been necessary for them to develop any local -- any lectures or program materials on Colorado specific topics?

A There would be little or no -- almost none. The only Colorado-specific topic that they would absolutely have to deal with would be the performance test.

Q What about -- are there any subjects that are offered in your full-service course which are Colorado specific?

A Only the performance test and SA testing.

Q Are there any -- is it fair to say, then, that all of the other lectures are given by BAR/BRI lecturers except for these Colorado-specific courses you've just identified?

A Well, no. Family law, for instance, is lectured by a Colorado lecturer, but the preparation of the materials is based on a general and not a state specific subject.

Q Are there any state subjects in Colorado other than the ones you've just mentioned?

A There is no areas of law which are tested at the state specific level.

Q Is Colorado different in that regard from other states?

A Colorado is mainstream in that regard.

Q Do you know how California is in that regard?

A No, I don't know specifically about California.

Q What about civil procedure?

A In Colorado, it is tested under the federal rules.

Q And criminal procedure as well?

A Under the U.S. Constitution.

Q Okay. Now, the next sentence says, I said that without their -- what's the next words there? -- I said that without their --

A -- full bar --

Q -- as a future threat, there had always been some room for cooperation, i.e., schedule coordination and literature availability. What did you mean by that?

A I meant that throughout the period of time that I had been involved with the bar review when there was a distinguishable and non-competitive position between PMBR and Colorado Bar Refresher where they were offering purely a supplemental program and I was offering full-service, that there had been and could have been some

productive efforts to cooperate with one another, perhaps to share information in promulgating our schedules and perhaps to cooperate with one another in making brochures and literature available to students.

Q Were you -- and did you say just that to Russell Granger?

A That the potential had always existed --

Q -- but --

A -- for that.

Q But -- and did you say that to Russell Granger in your telephone call?

A Yes, that prior to their having positioned themselves to compete directly for full-service enrollment with me, there -- it had been, in my opinion, an open possibility to arrive at some cooperative arrangements.

Q But were you saying that it was not an open possibility to have cooperative arrangements with PMBR so long as they constituted a future threat with their full bar?

A I'm saying that since they had now positioned themselves as being a direct competitor, in a potential circumstance wherever a student who took their course would not take mine, that it would be much more difficult to cooperate. There would be a much greater risk of it involving a level of antitrust cooperation between com-

petitors, and it could be an act of business stupidity on my part.

Q Were you hoping to persuade PMBR to not institute a future threat to offer a full-service bar in Colorado by offering the fig leaf of schedule coordination and literature availability?

A I had no illusions at all that the golden opportunity to cooperate in scheduling with me would deter them from entering the market if they thought it was profitable for them. I simply would have preferred -- frankly, I would have preferred to cooperate with them on scheduling and would have liked to at least know whether or not they felt that was something we could do.

Q Why would you have preferred to cooperate on scheduling?

A I would prefer to minimize the number of complaints that I get from students about schedule conflicts.

Q Why would you have preferred to do that?

A I don't like it when my students complain.

Q How could you have engaged in schedule coordination with PMBR given the fact that they were a competitor of yourself in the supplemental bar review market?

A Since my primary product has always been a full-service bar review, then I would have no problem with enhancing my full-service product by sharing information with them that would let them eliminate conflicts.

Q Well, would you have felt that way even though that would have made it easier for PMBR to compete with you in the supplemental market?

A In the supplemental market, the competition with PMBR was based on much more significant factors than whether or not I made life easier for my full-service students.

Q And what were these significant factors to which you are referencing?

A The persistent use of disparaging and false advertising by PMBR in mischaracterizing BAR/BRI in general and Gilbert's or HBJ Multistate, which I am certain to those students who read and listened to it had much more bearing in their mind than a possible schedule problem.

Q Now, how long -- I didn't mean to interrupt you.

A That's fine. There's one. There are probably other factors.

Q Now, how long have you had the belief that PMBR has engaged in false and deceptive advertising practices with respect to CBR?

A As long as I have been aware of PMBR advertising which would date back to about 1980.

Q And have you ever expressed a view to others that you believe that PMBR was engaging in false and deceptive advertising?

A I have expressed that view to Richard Conviser; I've expressed it to Gerald Kopel during the time that he was running it; I've expressed it to PMBR on a couple of occasions, but I have not expressed it to consumers or anyone other than that.

Q Now, to whom at PMBR did you express that point of view?

A A gentleman by the name of Jarad Gross.

Q When did you do that?

A About 1986.

Q Have you held the view that PMBR is engaged in false and deceptive advertising -- have you held that view from 1980 to the present?

A Yes, I have.

Q Was there ever a point in time during that time that you felt that PMBR was not engaging in false and deceptive advertising?

A No.

Q Why did you not sue them?

A Because I was certain if I did, one, I could not afford the cost of litigation, and two, I would not be able to afford the cost of defense against an entity which was many times my size financially.

Q Now, is BAR/BRI paying the legal fees in this case to prosecute the false advertising claim that you have filed against PMBR?

A BAR/BRI is paying the claims -- my claims on this case in terms of the defense and the related counterclaims. They are paying those fees only because the case was generated by a complaint against me. We had no agreement with them that would permit me to obligate them on a legal fee by filing an initial case.

Q But, what provision in your licensing agreement requires BAR/BRI to pay legal fees for you to sue PMBR?

A The raising of counterclaims is something which they certainly have the option of determining is or is not within the appropriate scope of defense. I would say that is a tactical and legal judgment between BAR/BRI and their counsel whether they choose to characterize any counterclaims as exceeding the scope of an appropriate defense.

Q Is it your testimony that the reason you brought the claim now, but not before, was because BAR/BRI is willing to pay for it?

A Because -- for two reasons: One, because now I'm in court anyway, so there is no way to avoid it; and two, since BAR/BRI is involved and it is a defense, I do have assistance with the cost of litigation.

Q When you say there is no way to avoid it, what do you mean by that?

A Since I'm already in court, I can't stay out of court. By not filing a case two years ago, I stayed out of court altogether.

Q Okay. Now, it says in the next sentence that he was to -- I'm sorry. What did Mr. Granger *say [sic], if anything, in response to your discussion about schedule coordination and literature availability?

A He agreed, in general, that it would be productive and useful in Colorado where there was no real reason for strong animosity or problems to have some level of cooperation. He thought it would be a desirable thing, and said that he would get back to me if there was anything further that developed on it.

Q Well, it says that he was to check with Bob Feinberg for a feel as to -- what is that next word? -- as to --

A Imminence.

Q -- imminence of expansion here. Is that right? Did Mr. Granger agree to do that?

A He suggested that he was going to. I wouldn't call it an agreement. He made that statement that he was going to check with Feinberg.

Q And had you asked him to do that?

A No, I had not.

Q Did you want him to do that?

A I really -- I thought it was a good idea on his part.

Q Why?

A If, in fact, there was an opportunity and a productive purpose to be served by cooperating, I would rather -- and, in fact, my concerns about PMBR's expansion in Colorado were totally unfounded, then it would seem unreasonable on my part to forgo those benefits of cooperation.

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Civil Action No. 92-Z-2330

MULTISTATE LEGAL STUDIES, INC., a Delaware Corporation,

Plaintiff,

v.

HARCOURT BRACE JOVANOVICH LEGAL AND PROFESSIONAL PUBLICATIONS, INC. and COLORADO PROFESSIONAL EDUCATION, INC. d/b/a COLORADO BAR REFRESHER, INC.,

Defendants.

AFFIDAVIT OF ROBERT FEINBERG

. . . .

60. In contrast, out of 24 schedule conflicts in the Winter of 1991 there were 8 major conflicts (or 33.3%); out of 20 schedule conflicts in the Summer of 1991 there were 9 major conflicts (or 45%); out of 32 schedule conflicts in the Winter of 1992 there were 12 major conflicts (or 37.5%); out of 37 schedule conflicts in the Summer of 1992 there were 17 major conflicts (or 45.9%); out of 30

schedule conflicts in the Winter of 1993 there were 13 major conflicts (or 43.3%); and out of 33 schedule conflicts in the Summer of 1993 there were 11 major conflicts (or 33.3%).